National Defence / Défense nationale

ANNUAL REPORT

of the Judge Advocate General to the Minister of National Defence on the administration of military justice in the Canadian Forces: a review from 1 september 1999 to 31 march 2000

Office of the Judge Advocate General / Cabinet du Juge-avocat général

Canada

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The Honourable Art Eggleton
Minister of National Defence
National Defence Headquarters
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30 May 2000

Dear Minister,

It is my honour to present to you the very first Annual Report of the Judge Advocate General on the Administration of Military Justice in the Canadian Forces, made pursuant to Section 9.3 of the *National Defence Act*.

Yours truly,

Jerry S.T. Pitzul
Brigadier-General
Judge Advocate General

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101-03136/

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Chapter 1

INTRODUCTION

THE LEGAL REQUIREMENT TO REPORT ANNUALLY ON MILITARY JUSTICE: A SIGN OF CHANGE AND REFORM

On 10 December, 1998, Bill C-25, containing amendments to the *National Defence Act* (*NDA*), received royal assent.[1] The majority of the *NDA* amendments and the necessary implementing *Queen's Regulations and Orders* (*QR&O*) dealt with matters concerning military justice and took effect on 1 September 1999.

The reformation of the military justice system was the product of an unprecedented level of study, consultation and inquiry. Most of the elements of reform enacted by the Government of Canada were based upon recommendations contained in various reports to Government. These included: the 1994 report of the Summary Trial Working Group, the March 1997 "Report of the Special Advisory Group on Military Justice and Military Police Investigation Services" chaired by the late Right Honourable Brian Dickson, former Chief Justice of the Supreme Court of Canada, the 25 March 1997 Report to the Prime Minister on the Leadership and Management of the Canadian Forces by the Minister of National Defence, the June 1997, Somalia Commission of Inquiry Report, and in July 1997 the Second Report of the Special Advisory Group entitled "Report on the Quasi-Judicial Role of the Minister of National Defence."

One of the many recent reforms is that the Judge Advocate General is now legally required to report annually[2] to the Minister of National Defence on the administration of military justice. Additionally, the Minister shall have a copy of this Annual Report laid before each House of Parliament.[3]

[1] Now that the Bill has received royal assent, it is officially referred to as Statutes of Canada (S.C.) 1998, Chapter 35.
[2] Section 9.3(2) *NDA*.
[3] Section 9.3(3) *NDA*.

This new, historic, requirement is one of the many welcomed and important changes contained in a comprehensive program of reform which is designed to promote greater accountability and transparency in the military justice system and strengthen the Canadian Forces as a vital national institution.

OVERVIEW OF THE ANNUAL REPORT

As noted, the reform of the military justice system is part of a broader process of change currently being undertaken within the Canadian Forces and Department of National Defence.

The reforms were designed to modernize the *Code of Service Discipline* — that portion of the *NDA* which deals with military justice — and to promote accountability, fairness, integrity and transparency within the military justice system.

The changes have resulted in a structure that is more consistent with Canadian civilian legal procedure and standards while still preserving the military requirements that underscore the rationale for a distinct military justice system — including the requirement to maintain portable service tribunals, with prompt but fair processes, capable of operating in time of conflict or peace, in Canada or abroad.

The amendments to the *NDA* and regulations have generally reformed the military justice system by:

- clarifying the roles and responsibilities of the Minister of National Defence, the Judge Advocate General and military judges,
- clearly separating executive, investigative, prosecutional, defence and judicial functions,
- modernizing the court martial and summary trial processes,
- strengthening oversight and review to ensure that military justice is fair and meets the expectations of Canadians.

This Annual Report will cover the reporting period of 1 September 1999 until 31 March 2000. Subsequent reports will cover the full fiscal year from 1 April until 31 March. In doing so it will report on the Office of the Judge Advocate General, the Canadian military justice system, the summary trial process, courts martial, appeals from courts martial, the Judge Advocate General initiatives in relation to military justice and will conclude with final remarks. Supplemented by Annexes, this report will highlight the major aspects of reform which took effect on 1 September 1999 and will also identify noteworthy activities relating to the administration of military justice which have occurred during the reporting period.

In addition a report from the Director of Defence Counsel Services and a report from the Director of Military Prosecutions are included as Appendices.

Chapter 2

THE JUDGE ADVOCATE GENERAL AND THE RELATIONSHIP TO KEY ACTORS WITHIN THE MILITARY JUSTICE SYSTEM

As noted in Chapter 1, two of the major areas of reform clarify the roles and responsibilities of the Minister of National Defence, the Judge Advocate General and military judges, and clearly separate, on an institutional basis, executive, investigative, prosecutional, defence and judicial functions.

The Minister of National Defence as an elected member of Parliament and a member of the executive of government is accountable to Parliament for the proper functioning of his department including the administration of military justice.

However, there remains a legal requirement to maintain an appropriate separation of the executive from the judicial arm of government as a fundamental tenet of our constitutional and common law based justice system, including that found in the military.

Importantly, the recent reforms appropriately insulate the Minister and other executive members from the judicial arm by divesting them of previously held judicial and quasi judicial duties. This was purposely done to ensure a proper legal separation of the executive from the judicial arm of the government.

The new legislative scheme also establishes and defines the independent actors, their responsibilities within the military justice system, and creates the necessary legislative buffers between their various functions.

This includes the assignment of the military justice superintendence responsibility to the Judge Advocate General; the exercise of prosecutorial discretion by the Director of Military Prosecutions in a manner similar to a Director of Public Prosecutions in a civilian system; the conduct of an accused's defence by the Director of Defence Counsel Services; and the creation of constitutionally independent courts having the powers of superior courts of criminal jurisdiction to control their own process.

The duties and interrelationships of the key actors in the military justice system have been carefully and thoughtfully crafted to ensure the constitutionality of the system and to avoid allegations of improper executive interference or "command influence".

PARLIAMENT HAS DEFINED THE DUTIES AND POWERS OF THE JUDGE ADVOCATE GENERAL IN CANADIAN LAW

The position of the Judge Advocate General has a long history in British common law. The earliest reference to the position is found in 1639 in the Articles of War under the authority of Charles I. From a Canadian perspective the first Judge Advocate General was appointed by Order in Council on 1 October, 1911.

Yet, despite the historical development of the role of the Judge Advocate General the "Report of the Special Advisory Group on Military Justice and Military Police Investigation Services"[4] has properly noted;

> "The powers of the Judge Advocate General, while they are referred to in the National Defence Act are not set out explicitly in the legislation".

Recent amendments to the *NDA* have addressed this point and have clearly defined the appointment, duties, powers and functions of the Judge Advocate General. Now, the role of the Judge Advocate General is clearly defined in Canadian law.

- ⊕ appointment by Governor in Council

  The Judge Advocate General is only one of two uniformed military members of the Canadian Forces who are appointed by Governor in Council[5].

- ⊕ legal advisor in military law

  The Judge Advocate General acts as legal adviser to the Governor General, the Minister, the Department and the Canadian Forces in matters relating to military law.[6]

- ⊕ superintendence of military justice

  The Judge Advocate General was given express and specific legislated responsibility under the recently amended *NDA* to superintend the military justice system.[7] In legislating this role Parliament, in effect, recognized and continued the exercise of the Attorney-General like responsibilities historically performed by the Judge Advocate General under English common law.[8]

[4] 14 March, 1997, p. 26.
[5] See section 9(1) of the *NDA*, the other appointment is the Chief of Defence Staff.
[6] Section 9.1 *NDA*.
[7] Section 9.2 *NDA*.
[8] As noted in the March 1997 "Report of the Special Advisory Group on Military Justice and Military Police Investigation Services".

- review and report

  Within this superintendence function, the Judge Advocate General is required by statute to conduct regular reviews[9] of, and report annually to the Minister on, the administration of military justice.

As will be elaborated below in Sections 6 and 7 the Judge Advocate General has also been entrusted by Parliament with the general supervision of the Director of Military Prosecutions and the Director of Defence Counsel Services.[10]

Not only has Parliament defined the role of the Judge Advocate General but it has done so in a way which expressly acknowledges the supremacy of civilian authority through the "appointment", "responsibility' and "review" mechanisms.

THE ORGANIZATION OF THE OFFICE OF THE JUDGE ADVOCATE GENERAL

The Office of the Judge Advocate General consists of 93 Regular Force legal officers and 37 Reserve Force legal officers.

The largest grouping of Regular Force legal officers are located in Ottawa with seven Assistant Judge Advocate General offices located throughout Canada and Germany. Additionally there are eight Deputy Judge Advocate and four Regional Military Prosecution offices located throughout Canada. During this reporting period legal officers were deployed operationally, to Macedonia/Kosovo, Italy, East Timor and two locations within Bosnia.

Organization charts for Regular and Reserve legal officers can be found at Annex A.

A listing of addresses and phone numbers for Regular Force Judge Advocate General offices can be found at Annex B.

Strategic Use of Resources by the Office of the Judge Advocate General

The Office of the Judge Advocate General is currently understaffed. At present there is a 13% vacancy rate in legal officer positions. The consequence of enduring long, but expected time lags between recruitment and delivery of trained legal officers to meet the new roles and expanded commitments has meant that practically speaking the Office is currently understaffed by approximately 25%. It will not be until the summer of 2001 that the Office will have a full establishment of military lawyers and even then, training lags will prevail for at least another year.

Consequently a strategy has been developed for the use of limited resources. From a military justice perspective it is important to note that, as a matter of highest priority, personnel and finances have been apportioned to restoring the credibility of the military justice system, implementing Bill C-25 and ensuring the consequential restructuring of the delivery of military justice related legal services. A detailed statement on the strategic use of the

9 Section 9.2(2) *NDA*.
10 Section 165.17(1) and 249.2(1) *NDA*.

personal and financial resources by the Office of the Judge Advocate General can be found in the "FY 00/01 Strategic Letter — Office of the Judge Advocate General."[11]

KEY AREAS OF THE OFFICE OF THE JUDGE ADVOCATE GENERAL INVOLVED WITH MILITARY JUSTICE

Within the combined Reserve and Regular Force Judge Advocate General organization the following areas are involved in whole or part with matters of military justice:

Office of the Canadian Military Prosecution Service

- ⊕ includes the Director of Military Prosecutions (DMP), the Deputy Director of Military Prosecutions and all legal officers appointed to assist and represent the DMP,
- ⊕ duties include "preferring" all charges to be tried by courts martial, conducting and co-ordinating of the prosecution of all courts martial and acting as appellate counsel[12],
- ⊕ advises the Canadian Forces National Investigative Service (CFNIS),
- ⊕ DMP has field offices referred to as Regional Military Prosecutors (RMP) located geographically in the same areas as CFNIS regional offices.

Office of the Director of Defence Counsel Services

- ⊕ includes the Director of Defence Counsel Services (DDCS) and the Deputy Director of Defence Counsel Services and all legal officers appointed to assist and represent DDCS.

Pursuant to regulations[13] the duties of DDCS would include the provision of legal advice and services:

- ⊕ to persons arrested or detained in respect of a service offence,
- ⊕ to assisting officers on summary trial matters,
- ⊕ to an accused person where there are reasonable grounds to believe that the accused is unfit to stand trial,
- ⊕ to an accused person with respect to the making of an election to be tried by court martial,
- ⊕ to a person held in custody during a show cause hearing,
- ⊕ to an accused person during application before a referral authority for the disposal of a charge,
- ⊕ to the Respondent on matters appealed by the Minister before the Court Martial Appeal Court of Canada, and
- ⊕ with the approval of the Appeal Committee, to the Appellant before

[11] 15 December 1999, found at www.dnd.ca/jag under menu bar item "Office of the Judge Advocate General"
[12] Section 165.11 *NDA*.
[13] See *QR&O* 101.20.

the Court Martial Appeal Court of Canada and the Supreme Court of Canada.

Office of Deputy Judge Advocate General/Operations

- Responsible for the provision of legal advice including military justice issues to the military police and units and formations through:
  - legal officers located at Assistant Judge Advocate General and Deputy Judge Advocate offices throughout Canada and in Europe,
  - operationally deployed field legal officers in East Timor, Bosnia, Kosovo/Macedonia and Italy
- Responsible for developing military justice training, and conducting the Presiding Officers Certification Training of CF members on military justice through the Directorate of Law/Training.

Office of Deputy Judge Advocate General/Chief of Staff

- Provides legal advice and services on matters of military justice policy and research through the Directorate of Law/Military Justice Policy and Research.

Sections 6 and 7 will specifically focus on the role of DMP and DDCS and how they relate to the Judge Advocate General and other key actors within the military justice system.

"RESPONSIBILITY" TO THE MINISTER OF NATIONAL DEFENCE

The Minister of National Defence is in a unique position in Canada. The Minister is not only responsible for DND and the CF, but he also has responsibility for "a separate, full fledged military justice system".[14] The Minister, in turn, is responsible to Parliament with respect to the administration of that justice system.

However, the role performed by the Minister has by way of recent amendment to the *NDA* been defined by Canadian law. Indeed, the recent reforms of the military justice system were designed to divest the Minister of many judicial and quasi judicial, pre and post trial, roles so that the Minister's executive function could be insulated from the day to day operation of the military justice system.[15]

This was accomplished in part by legislatively assigning the "superintendence of military justice" to the judge Advocate General.

Transparent accountability by the Judge Advocate General to the Minister has been enhanced through a number of legislative changes including:

[14] Special Advisory Group, "Report on the Quasi-judicial Role of the Minister of National Defence" (Dickson II) July, 1997 at p. 6.

[15] Many of the recommendations which led to *NDA* amendment in this area were contained in the "Report on the Quasi-judicial Role of the Minister of National Defence" (Dickson II).

- the clear statement that the Judge Advocate General is "responsible to the Minister in the performance of the Judge Advocate General's duties and functions,"[16]
- the appointment of the Judge Advocate General by Governor in Council,
- the requirement to publicly report annually[17] to the Minister on the administration of military justice, and
- the requirement that the Minister shall cause an independent review of the amendments to the *NDA* and shall cause a report on the review to be laid before each House of Parliament every five years.

THE MILITARY CHAIN OF COMMAND AND THE DEPUTY MINISTER

The Judge Advocate General is "accountable"[18] by statute for the legal advice given to the Chief of Defence Staff, the military chain of command, and the Deputy Minister to the Minister. This was done to enhance the integrity and independence of the Judge Advocate General from the chain of command in the provision of legal advice, particularly in areas of military justice.

An organization chart contained at Annex C displays the position of the Judge Advocate General within the Canadian Forces and the Department of National Defence.

This independent role is reinforced in regulations which acknowledge that all legal officers shall be posted within the office of the Judge Advocate General, under the authority of the Judge Advocate General and "not subject to the command of an officer who is not a legal officer".[19]

THE DIRECTOR OF MILITARY PROSECUTIONS

Further enhancement to the role played by key legal officers within the context of the military justice system has been achieved by the recent *NDA* amendments through the creation of legislative buffers around the offices of both the Director of Military Prosecutions[20] and the Director of Defence Counsel Services.

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[16] Section 9.3(1) *NDA*.

[17] Section 9.3(2) *NDA*.

[18] For an elaboration on the concepts of responsibility, authority and accountability within the context of the Canadian Forces and Department of National Defence see the DND publication "Organization and Accountability", second edition, September 1999.

[19] *QR&O* 4.081.

[20] Section 165.1(1) *NDA*.

The DMP holds office upon appointment by the Minister for a period not to exceed four years[21] and may only be removed from office by the Minister for cause on the recommendation of an Inquiry Committee.[22] There have been no incidents requiring the Inquiry Committee to sit during the reporting period.

The primary statutory functions of DMP, and the legal officers who assist DMP,[23] are the "preferring" of all charges to be tried by court martial and the conduct of all prosecutions at courts martial.[24]

DMP is also given express legislative authority to "withdraw" a charge that has been preferred.[25]

Upon instruction from the Minister, DMP acts as counsel for the Minister in respect of appeals before the Court Martial Appeal Court of Canada.[26]

From the viewpoint of military justice reform it is important to highlight the fact that civilian authority represented by the Minister — not the Judge Advocate General — is the sole authority with the powers to appoint and remove the DMP.

Additionally, it is also important to highlight the fact that DMP is the only authority — completely independent from the chain of command — to "prefer" or decide whether to proceed with charges before courts martial.

The *NDA* amendments ensure that no command authority within the Canadian Forces can decide or influence DMP's decision of whether to "prefer", or proceed with, charges to courts martial.

In making the determination whether to prefer charges, and how to conduct the prosecution through the exercise of crown discretion by DMP, the buffers contained within the *NDA* and the common law have insulated and ensured the independence of the DMP in a manner similar to a Director of Public Prosecutions under the civilian criminal justice system.[27]

The relationship between the Judge Advocate General and the DMP has also been statutorily defined in the recent *NDA* amendments.

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[21] Section 165.1(2) *NDA*. On 1 September 1999 Colonel Kim Carter was appointed DMP.

[22] Section 165.1(2), (2.1) *NDA*. See also *QR&O* 101.13.

[23] Section 165.15 *NDA*. The DMP may be assisted and represented by officers who are barristers or advocates with standing at the bar of a province.

[24] Section 165.11 *NDA*.

[25] Section 165.12(2) *NDA*, although once a court martial has commenced DMP may only withdraw a charge with the consent of the court.

[26] Section 165.11 *NDA*. On 1 September 1999 DMP was instructed to act as counsel for the Minister in respect of appeals.

[27] From the decision of *Balderson v R.* (1983) 8.C.C.C. (3d) 532 (Man C.A.) Canadian courts have placed significant legal restrictions on the review of the exercise of prosecutional discretion. Courts will only undertake such a review in the clearest of cases of abuse of process.

The DMP is under the "general supervision of the Judge Advocate General".[28] The Judge Advocate General may issue general instructions or guidelines in writing in respect of prosecutions or in respect of a particular prosecution.[29] Except in limited cases, DMP, must ensure that such instructions are made available to the public.[30] The Judge Advocate General must provide the Minister with a copy of every instruction and guideline.[31]

During this reporting period one General Instruction was issued to DMP. This is contained in Annex H. This General Instruction required DMP to develop, implement and make publicly available prosecution policies in a number of areas including the DMP relationship with the Canadian Forces National Investigation Service, pre-charge screening, the exercise of prosecutorial discretion during post-charge screening and disclosure, and accountability.

The Annual Report of DMP is contained at Appendix 2. This is a very detailed report which outlines the organization and primary functions of the Canadian Military Prosecution Service, the prosecution process, courts martial and appeal results, policy training, communications and relationships with other key actors in the military justice system.

Perhaps the most significant point to draw from the DMP Report is that since the introduction of the new military justice system and the appointment of the DMP on 1 September 1999, the new DMP organization, necessary relationships and required processes have been established in a relatively short time period and are now functioning and maturing.

The DMP has identified the following areas as the most important for the upcoming year: fairness of prosecutions, timeliness of prosecutions and education of the military public about the court martial process. DMP's three primary goals for the upcoming year are to fully staff the reserve force positions and to effectively integrate them into DMP operations, to identify suitable candidates for military prosecution positions and to initiate a comprehensive introductory training programme on the military justice system.

Progress on attaining these goals will be reviewed throughout the upcoming reporting year. The anticipated increase in demand for DMP services will be closely followed to ensure that sufficient resources are available for the DMP to carry out her duties.

THE DIRECTOR OF DEFENCE COUNSEL SERVICES

The Office of the Director of Defence Counsel Services (DDCS) was created by the recent *NDA* amendments which took effect on 1 September 1999.[32] The DDCS is appointed by the Minister.[33]

[28] Section 165.17(1) *NDA*.

[29] Section 165.17(2), (3) *NDA*.

[30] Section 165.17(4), (5) *NDA*.

[31] Section 165.17(6) *NDA*.

[32] Section 249.18 *NDA*.

[33] On 1 September 1999 Lieutenant Colonel D. Couture was appointed DDCS.

The recent reforms have greatly expanded the opportunities that a CF member has to consult free of charge with a military lawyer from the office of the DDCS.

These opportunities have been broadened to include:

- the giving of advice on summary trial matters relating to whether an accused should elect trial by court martial;
- advising persons who are the subject of criminal and formal administrative investigations; and
- representing the Appellant or Respondant before the Court Martial Appeal Court of Canada or the Supreme Court of Canada.

Parliament has also inserted legislative protection to ensure separation between DDCS and other CF/DND authorities in order to protect DDCS from potentially inappropriate influence.

DDCS performs his duties independent of the chain of command. DDCS lawyers represent their clients and their client's interests in accordance with DDCS and Judge Advocate General policy which are designed to preserve and enhance the legal and ethical obligations to their client's interests. Communications with their clients are protected at law by the solicitor client privilege.

DDCS "acts under the general supervision of the Judge Advocate General".[34] The Judge Advocate General "may issue general instructions or guidelines in writing in respect of defence counsel services." There is no statutory basis which permits the Judge Advocate General to issue to DDCS instructions or guidelines in respect of a particular defence or court martial. Furthermore, any general instructions or guidelines must be made available to the public."[35]

During the reporting period one General Instruction was issued to DDCS. This is contained in Annex H. This General Instruction required DDCS to develop, implement and make publicly available DDCS policies in the following areas; solicitor/client privilege, conflict of interest, relationship with the chain of command, professional conduct, and media relations.

The Annual Report of the Office of the DDCS is contained at Appendix 1. Following a description of DDCS organization, duties and responsibilities and a discussion on the relationship with the chain of command the Report contains an interesting statistical review of the services provided.

During the reporting period 27 courts martial were held. DDCS Counsel represented the accused person in 78% of these cases while civilian counsel represented the accused person in 18% of the cases. The accused was self represented 4% of the time.

With respect to the 24 hour/7 days a week advisory services, the Office of the DDCS received 376 telephone calls for legal advice during the reporting period. Approximately 330 calls originated from within Canada while

[34] Section 249.2(1) *NDA*.

[35] Section 249.2(3) *NDA*.

approximately 46 were from outside the country. Sixteen percent were related to issues of court martial election. Of those calls not related to court martial election, 32% of the calls were made by a person who was detained or arrested and who exercised their Charter right to consult with counsel, 16% concerned some aspect of the summary trial process not relating to election and 25% related to some other aspect of the disciplinary process.

The above statistics demonstrate that the Office of the DDCS is accessible and is being accessed by CF members.

THE OFFICES OF THE CHIEF MILITARY JUDGE AND THE COURT MARTIAL ADMINISTRATOR

In order to strengthen the independence of the military judiciary a number of very important reforms have been undertaken during the reporting period.

The most significant elements of reform go to the three core characteristics of judicial independence — financial security, security of tenure and administrative independence — and include:

- the appointment of military judges by the Governor in Council for a fixed term,[26]
- the re-appointment of military judges by the Governor in Council, on the recommendation of the Renewal Committee,[27]
- the removal of a military judge by the Governor in Council only for cause on the recommendation of an Inquiry Committee,[28]
- the review of issues of remuneration by the Military Judges Compensation Committee[29], and
- the establishment of the Office of the Chief Military Judge as a separate unit within the CF and defined by its own Ministerial Organization Order.

The Renewal, Inquiry and Compensation Committees are composed of civilians.

Of these newly established committees, the Military Judges Compensation Committee — chaired by the Honourable Mr. Peter Cory, retired Justice of the Supreme Court of Canada — is the only one to sit during the reporting period. The other members of the committee are Mr. Roger Tassé Q.C. and Mr. Ian Clark.

Under the current reformed military justice system the military judges are independent from the military chain of command, the executive, Departmental authorities and the Judge Advocate General.

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[26] Section 165.21 *NDA*.

[27] Section 165.21(3) *NDA*, *QR&O* 101.15.

[28] Section 165.21(2) *NDA*, *QR&O* 101.13.

[29] Section 165.22 *NDA*, *QR&O* 204.23.

Apart from enhancing the statutory basis for the independence and impartiality of the military judges, Parliament has removed the chain of command from the process of convening courts martial. Now, courts martial are convened by the Court Martial Administrator (CMA) — a civilian — who acts under the supervision of the Chief Military Judge.[40]

The CMA shall convene a court martial when a charge is preferred by the DMP.[41] This now completes the process of removing the chain of command from deciding if a charge will proceed to court martial, the type of court martial that will be held, who will be the panel members and where the trial will take place.

THE DEPARTMENT OF NATIONAL DEFENCE/ CANADIAN FORCES LEGAL ADVISOR (DND/CF LA)

In accordance with his statutory responsibilities, the Judge Advocate General acts as legal adviser to the Governor General, the Minister of National Defence, DND and the CF in matters relating to military law and has the superintendence of the administration of military justice in the Canadian Forces. The Office of the DND/CF LA is composed of a mix of Judge Advocate General and Federal Department of Justice lawyers and is responsible for the provision of legal advice on issues other than military law and military justice.

From the outset the office of the Judge Advocate General and the office of the DND/CF LA have worked well together in providing legal services to DND/CF clients.

OFFICES OF REFORM: THE OMBUDSMAN, THE CF GRIEVANCE BOARD AND THE MILITARY POLICE COMPLAINTS COMMISSION

Recently, the Office of the Ombudsman, the CF Grievance Board and the Military Police Complaints Commission were formed. The CF Grievance Board and the Military Police Complaints Commission are external and independent statutory bodies created by the recently amended *NDA* while the Office of the Ombudsman is a creation of the Minister. The Ombudsman is a representative of the Minister and is outside the chain of command.

All three bodies are important developments in the overall process of a comprehensive program of institutional change and reform within the CF and DND.

As noted during the introduction, and as illustrated throughout this Chapter, two key areas of reform have clarified the roles and responsibility of the key actors within the military justice system and have separated on an institutional basis, the executive, investigative, prosecutorial, defence and judicial functions.

[40] Section 165.18, .19 *NDA*.

[41] Section 165.19(1) *NDA*.

The late Right Honourable Mr. Justice Dickson in the Special Advisory Group "Report on the Quasi-Judicial Role of the Minister of National Defence" of July 1997 identified a number of areas in which the "executive", personified by the Minister of National Defence, had judicial or quasi judicial functions within the military justice system.

Based upon recommendations from the Special Advisory Group, the *NDA* was amended in a way that divested the Minister of these quasi-judicial functions and created a clear legislative separation between the "executive" and "judicial" arms of the Department.

On 16 December 1999 the Ombudsman filed a public Report to the Minister of National Defence recommending that regulations be passed which would allow the Ombudsman "on behalf of the Minister" to oversee virtually all actors within the military justice system — including lawyers within the Office of the Judge Advocate General, DDCS, DMP and the military judges. These proposals raise some concerns which could adversely effect the reforms directed at clearly separating the key actors from the executive and could raise issues of a constitutional nature about the military justice system. At the time of writing the Ombudsman's Report was still undergoing review.

As stressed, the creation and evolution of the CF Grievance Board, the Military Police Complaints Commission and the Ombudsman are important and positive developments in the overall process of institutional reform. As the reform process continues it should not be surprising that there are, and will be moments, when the respective evolving organizations must pause to ensure they do not encroach or inadvertently affect the other areas of reform. The challenge, from a military justice perspective, will be to ensure that all elements of the overall institutional reformation of DND/CF are co-ordinated in a way which continues to strengthen the institution as a whole.

Chapter 3

THE CANADIAN MILITARY JUSTICE SYSTEM

THE PURPOSE OF A SEPARATE INTERNAL SYSTEM OF MILITARY JUSTICE WITHIN THE CANADIAN FORCES

On two occasions[42] the Supreme Court of Canada has addressed the issue of whether there is a need for a separate and distinct system of military justice.

On both occasions the Supreme Court of Canada upheld the need for a separate internal system of military justice within the Canadian Forces. In the most recent decision, *R v. Généreux* the Supreme Court of Canada outlined the rationale behind the requirement to maintain a military system of justice distinct from the civilian criminal system:

> The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. As a result, the military has its own *Code of Service Discipline* to allow it to meet its particular disciplinary needs. In addition, special service tribunals rather than ordinary courts have been given jurisdiction to punish breaches of the *Code of Service Discipline.* Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus the need for separate tribunals to enforce special

[42] *MacKay v. The Queen*, [1980] 2 S.C.R. 370, and *R v. Généreux*, [1992] 1 S.C.R. 259.

disciplinary standards in the military. I agree, in this regard, with the comments of Cattanach J. In *Re MacKay and The Queen* (1977), 36 C.C.C. (2d) 522, at pp. 524-5, 78 D.L.R. (3d) 655 at p. 657, [1978] 1 F.C. 233 (T.D.):

> Without a *Code of Service Discipline* the armed forces could not discharge the function for which they were created. In all likelihood those who join the armed forces do so in time of war from motives of patriotism and in time of peace against the eventuality of war. To function efficiently as a force there must be prompt obedience to all lawful orders of superiors, concern, support for and concerted action with their comrades and a reverence for and a pride in the traditions of the service. All members embark upon rigorous training to fit themselves physically and mentally for the fulfilment of the role they have chosen and paramount in that there must be rigid adherence to discipline.
>
> Many offences which are punishable under civil law take on a much more serious connotation as a service offence and as such warrant more severe punishment. Examples of such are manifold such as theft from a comrade. In the service that is more reprehensible since it detracts from the essential *esprit de corps*, mutual respect and trust in comrades and the exigencies of the barrack room life-style. Again for a citizen to strike a superior officer is much more serious detracting from discipline and in some circumstances may amount to mutiny. The converse, that is for an officer to strike a soldier is also a serious service offence. In civilian life it is the right of the citizen to refuse to work but for a soldier to do so is mutiny, a most serious offence, in some instances punishable by death. Similarly a citizen may leave his employment at any time and the only liability he may incur is for breach of contract but for a soldier to do so is the serious offence of absence without leave and if he does not intend to return the offence is desertion.
>
> Such a disciplinary code would be less effective if the military did not have its own courts to enforce the code's terms.[43]

THE CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK OF THE CANADIAN MILITARY JUSTICE SYSTEM

Although a separate internal system has been held to be constitutional it is important to stress that the military justice system exists within and as part of, not separate from, the Canadian legal system.

As noted by the Special Advisory Group, "Canada is founded upon the supremacy of the Rule of Law especially characterized by the *Canadian Charter of Rights and Freedoms* which must be fully respected in the application of disciplinary measures within the military justice system." [44]

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[43] *R. v. Généreux*, [1992] 1 S.C.R. 259, at 293-4.

[44] Report of the Special Advisory Group on Military Justice and Military Police Investigation Services (Dickson 1), 14 March 1997, page ii.

In 1982 the existence and validity of the Canadian military justice system was directly recognized by the *Charter*, which forms part of the Constitution of Canada. Section 11(f) of the *Charter* recognizes the right of a person charged with an offence to a jury trial "except in the case of an offence under military law tried before a military tribunal."

It is recognized that the Canadian Constitution, including the *Charter of Rights and Freedoms*, is the supreme law of the land. All other pieces of legislation, federal and provincial, are subordinate to this over-arching law of the land. As a consequence, the *National Defence Act*, the *Code of Service Discipline* contained therein and its application are subject to and must meet the *Charter* Standard. Like every Canadian, all CF members are protected by the rights included in the *Charter*.

Under the Canadian Constitution, the Parliament of Canada has exclusive authority to make laws relating to the "militia, military and naval service and defence".[45] Consequently, Canadian constitutional law accords the Federal Parliament the right to invoke laws relating to military justice.

Using its constitutional authority, the Parliament of Canada has created and recently amended the *National Defence Act* which sets out, among a number of matters, the organization of the DND, the CF as well as the Canadian military justice system.

The *Code of Service Discipline* is a central part of the *NDA* and comprises approximately one-half of the Act.[46] The *Code of Service Discipline* is the foundation of the Canadian military justice system and sets out disciplinary jurisdiction, service offences, punishments, powers of arrest, organization and procedures of service tribunals, appeals, and post-trial review.

Under the *NDA*, there is authority for the Governor-in-Council and the Minister to make regulations for the organization, training, discipline, efficiency, administration and good government of the CF and generally for carrying the purposes and provisions of the *NDA* into effect. The *Queens Regulations and Orders* (*QR&O*) have been made pursuant to this authority. Volume II of *QR&O* is dedicated to disciplinary matters and prescribes in greater detail the jurisdiction, organization and procedures of the Canadian military justice system.

The *NDA* also authorizes the Chief of Defence Staff to issue orders and instructions to give effect to the decisions and carry out the directions of the Government of Canada and the Minister of National Defence.[47] The *Canadian Forces Administration Orders* (*CFAOs*) and *Defence Administrative Orders and Directives* (*DAODs*) have been made pursuant to this authority. A number of these orders and directives bear upon the military justice system.

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[45] Constitution Act, 1867, s. 91(7).

[46] Pursuant to section 2 of the *NDA*, the *Code of Service Discipline* consists of Part III of the *NDA*.

[47] Section 18(2) *NDA*.

Orders and instructions dealing with disciplinary matters may be issued at different levels throughout the chain of command.[48] All members have a duty to be familiar with and follow orders and instructions issued by the chain of command.[49] The failure of members to comply with these orders and instructions could lead to charges being laid and disposed of under the military justice system.

THE TWO TIERED NATURE OF THE MILITARY JUSTICE SYSTEM

The *NDA* creates a two tier system of military justice. The first tier, where most disciplinary matters are dealt with, is the summary trial system. The second tier of the military justice system is the more formal court martial system. The term service tribunal[50] means either an officer presiding at a summary trial or a court martial.

The following paragraphs will outline in a very general and brief manner the nature of the two tiered military justice system[51].

In doing so key aspects of recent reforms taking effect during this reporting period will be highlighted. A more detailed review of the summary trial, courts martial and appellate process will be discussed in subsequent Chapters.

Jurisdiction

The *Code of Service Discipline* applies to a broad range of persons although, primarily to CF members. However, civilians do on occasion become subject to Canadian military law, such as when they accompany units or other elements on service or active service.[52]

Service Offence

A *service offence* is an offence under the *NDA*, the *Criminal Code of Canada* or any other Act of Parliament committed by a person while subject to the *Code of Service Discipline.*

The *Code of Service Discipline* includes a number of service offences that are uniquely military in nature.[53] Examples of such offences include misconduct in the presence of the enemy, mutiny, disobedience of a lawful command, desertion, absence without leave, drunkenness, negligent performance of duty and conduct to the prejudice of good order and discipline.

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[48] *QR&O* 4.12 and 4.21.

[49] *QR&O* 4.02 and 5.01.

[50] Section 2, *NDA.*

[51] For a much more detailed and comprehensive overview of the military justice system see the Judge Advocate General publication "Military Justice at the Summary Trial Level" August 1999, downloadable at the Judge Advocate General website www.dnd.ca/jag.

[52] Section 60(1) *NDA* and *QR&O* 102.09. A complete list of the persons subject to the *Code of Service Discipline* is contained in sections 60-65 of *NDA* and *QR&O* 102.

[53] Sections 73-129 *NDA.*

Where an offence is committed by a person subject to the *Code of Service Discipline* under the Criminal Code or other Federal Law, the *NDA* provides jurisdiction to deal with the matter in the military justice system.[54] Such offences are service offences under section 130 of the *NDA*.

An offence committed by a person subject to the *Code of Service Discipline* under the law of a foreign country while outside Canada in that foreign country can also be a service offence.[55]

Limitation Periods

As a general rule, a person who is subject to the *Code of Service Discipline* at the time of the alleged commission of an offence continues to be liable to be charged, dealt with and tried at any time under the *Code of Service Discipline*.[56] There are two exceptions to this rule which have taken effect on 1 September 1999.

The first exception relates to offences resulting from violations of the *Criminal Code*, other Federal law, or a foreign law. If the act or omission that constitutes the offence would have been subject to a limitation period had it been dealt with other than under the *Code of Service Discipline*, that limitation period applies.[57] The second exception relates to summary trials. A summary trial must begin before the expiry of one year after the day on which the offence is alleged to have been committed.[58]

Pre-trial Custody

The *NDA* specifies the circumstances in which a person may be arrested and retained in pre-trial custody.[59]

Generally speaking the grounds upon which a person can be arrested and held in pre-trial custody are similar to those found under the *Criminal Code*. Of course the power to arrest and place in custody relates to a service offence and therefore the *NDA* only authorizes the arrest of persons who are or were subject to the *Code of Service Discipline* at the time of the commission of the alleged offence.

Effective 1 September 1999 a comprehensive process of pre-trial custody review has been put in place in order to ensure that persons are not committed to custody improperly or retained in custody longer than necessary. The *QR&O* require a review of custody at various intervals during the custody period. Most significantly, the new process of judicial review requires the person to be taken before a military judge, as soon as practicable, for a "show cause hearing" in all cases where the custody review officer does not release the person in custody.[60] The military judge will determine whether the person in custody should be released.

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[54] Section 130 *NDA*.

[55] Section 132 *NDA*.

[56] Sections 60(2), 69 *NDA*.

[57] Section 69(a) *NDA*.

[58] Section 69(b) *NDA*.

[59] See sections 154-159.9 *NDA*.

[60] See section 159 *NDA* and *QR&O* 105.24.

The decision of the military judge can be appealed to the Court Martial Appeal Court.[41]

Charge

A *charge* is a formal accusation that a person subject to the *Code of Service Discipline* has committed a service offence. A charge is laid when it is reduced to writing in Part 1 (Charge Report) of the Record of Disciplinary Proceedings (RDP) and signed by a person authorized to lay charges.[42]

The following persons may lay charges under the *Code of Service Discipline*:

- a Commanding Officer;
- an officer or non-commissioned member authorized by a commanding officer to lay charges; and
- an officer or non-commissioned member of the Military Police assigned to investigative duties with the CF National Investigation Service (CFNIS).[43]

Prior to 30 November 1997, members of the investigating agency had no authority to lay charges under the *Code of Service Discipline*. Amendments to *QR&O* have specifically granted members of the CFNIS such authority.[44]

A commanding officer or superior commander who decides not to proceed with a charge laid by the CFNIS is required to communicate that decision along with the reasons for the decision to the CFNIS. If, after reviewing the decision and reasons, the CFNIS considers that the charge should be proceeded with, the CFNIS may refer the charge directly to a referral authority for disposal.[45]

Effective 1 September 1999 persons laying charges are legally required to obtain advice from a legal advisor if:

- the charge could not be tried by summary trial,
- the charge would be a charge that would give rise to a right to elect trial by court martial, or;
- the offence is alleged to have been committed by an officer or non-commissioned member above the rank of sergeant.[46]

Trial of the Charge

Should charges proceed to trial the accused may be tried by either summary trial or court martial.

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[41] See section 159.9 *NDA* and *QR&O* 105.30.

[42] *QR&O* 107.015.

[43] *QR&O* 107.02.

[44] *QR&O* 107.02.

[45] *QR&O* 107.12(3).

[46] *QR&O* 107.03. Generally speaking the seeking of legal advice prior to laying a charge will be the rule rather than the exception; effectively legal advice must be obtained in all cases unless a person of the rank of sergeant or below is to be charged with one of five minor offences listed in *QR&O*.

The *QR&O* allow the charging authorities to refer charges to other service authorities in a number of circumstances. The regulations stipulate when a charge or case is to be referred, to whom the charge or case can be referred and the procedures to be followed.

While key reforms of the summary trial and court martial process are highlighted in the subsequent Chapters, two important areas of recent reform should be highlighted at this point;

- first, the opportunity for an accused to elect or choose to be tried by court martial and benefit from all aspects of natural justice including representation by a lawyer have been considerably widened;[67] and
- second, the only authority which can now decide to continue with prosecuting a charge before a court martial is DMP[68] — the independent prosecutor whose exercise of Crown discretion is completely insulated from the chain of command. This decision can only be changed pursuant to a specific written direction of the Judge Advocate General which must be made public.

Appeal of a Trial Decision

Decisions made at courts martials are, generally speaking appealable to the Court Martial Appeal Court of Canada — a civilian judiciary composed of Federal Court and Superior Court judges.[69]

Decisions on findings of guilt and sentence made at summary trial are reviewable in accordance with the recently reformed review procedures which provide two forms of summary trial review;

- *QR&O* 108.45 review by the presiding officers' superior; and
- *QR&O* 116.02 review by a wider group of review authorities which include the Chief of Defence Staff.

One significant aspect of reform is the new requirement that the *QR&O* 108.45 review authority must obtain legal advice before making a determination on any request for review.[70]

In addition to the new summary trial review processes an offender may also request judicial review from the Federal Court or from the Superior Court in any province.[71]

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[67] *QR&O* 108.14.

[68] Section 165.12(1) *NDA*.

[69] See sections 159, 234, 235, 238-243, 248.2-248.9 *NDA*.

[70] *QR&O* 108.45(8).

[71] *Federal Court Act*, R.S.C. 1985, c. F-7, section 18, 18.1.

Chapter 4

THE SUMMARY TRIAL

The summary trial is the most commonly used service tribunal for trying persons charged with a *Code of Service Discipline* offence.

Based upon statistics found in Annex D and E 94% of all persons tried within the military justice system during this reporting period were tried by summary trial.

THE PURPOSE OF THE SUMMARY TRIAL

The purpose of summary proceedings is to provide prompt but fair justice in respect of minor service offences and to contribute to the maintenance of military discipline and efficiency in Canada and abroad, in time of peace and armed conflict.[72]

As the above noted statistics demonstrate, the summary trial is the overwhelmingly predominant form of service tribunal. It exists to provide unit members with a means of enforcing discipline. Where a member is charged with a service offence, a summary trial permits the case to be tried and disposed of, as a general rule, at the unit level in a relatively quick fashion. Importantly, once jurisdiction exists to conduct a summary trial, a summary trial may be held anywhere in the world where the unit is deployed. During this reporting period summary trials were held throughout Canada, the United States, Italy, Germany, Bosnia, Kosovo, Macedonia, East Timor and at sea.

JURISDICTION

Summary trial jurisdiction over an accused is not automatic and is dependant upon a number of statutory and regulatory factors including: fitness of the

[72] *QR&O* 108.02.

accused to be tried, the status/rank of the accused as well as the presiding officer, the offence charged, the length of time passed before the commencement of trial, the interests of justice and discipline, the possible punishment which an accused may receive should a guilty finding be made and, if applicable the election of the accused to be tried by summary trial.[73]

Only service members below the rank of lieutenant-colonel can be tried by way of summary trial. Civilians who are subject to the *Code of Service Discipline* cannot be tried by summary trial.

Not all *Code of Service Discipline* offences can be tried summarily. *QR&O* 108.07[74] lists the offences that a Commanding Officer may try by summary trial. The most serious offences, including most *Criminal Code* offences charged pursuant to section 130 *NDA*, may only be tried by courts martial.

TYPES OF SUMMARY TRIALS AND POWERS OF PUNISHMENT

There are three types of summary trials. They are trial by: Delegated Officer, Commanding Officer and Superior Commander.

Delegated Officers are appointed by the Commanding Officer and must be of the rank of Captain or above. They may only try an accused below the rank of warrant officer and may try only a limited number of minor offences. These powers may be further restricted by a Commanding Officer. Delegated Officers do not have the authority to try *Criminal Code* offences charged under section 130 *NDA*.[75]

Commanding Officers may try accused persons who are either an officer cadet or below the rank of warrant officer.[76]

Superior Commanders may try officers below the rank of lieutenant colonel or non-commissioned members above the rank of sergeant.[77]

The maximum powers of punishment are as follows: a reprimand and a fine of not more than 25% of an offender's monthly pay for trial by Delegated Officers,[78] punishment of detention for up to 30 days for trial by Commanding Officer[79] and a severe reprimand and a fine of up to 60% of the offender's basic monthly pay for trial by Superior Commander.[80]

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[73] For a detailed consideration of jurisdiction see sections 60, 69, 70, 163, 164 *NDA*, *QR&O* 108.05 - 07, .09, 10, .12, .125, .16, .17, and 119.02.

[74] See *QR&O* 108.125 for offence jurisdiction for summary trial by superior commander and *QR&O* 108.10 for offence jurisdiction summary trial by delegated officer.

[75] *QR&O* 108.10.

[76] *QR&O* 108.06, section 163(1) *NDA*.

[77] *QR&O* 108.12, section 164(1) *NDA*.

[78] *QR&O* 108.25.

[79] *QR&O* 108.24.

[80] *QR&O* 108.26.

THE MAJOR AREAS OF SUMMARY TRIAL REFORM

Recent reforms have modernized the summary trial process and strengthened compliance with the *Canadian Charter of Rights and Freedoms* by enhancing procedural fairness.

Some of the more significant areas of reform that have occurred between November 1997 and 1 September 1999 are in the following areas:

- offence jurisdiction

  Restricting the offence jurisdiction of summary trials to those offences that are less serious in nature and for which jurisdiction is demonstrably necessary for the maintenance of unit discipline,

- assisting officer duties

  More clearly defining the role and articulating the duties of an assisting officer,[81] the officer appointed to assist an accused at a Summary Trial.

- election

  Extending the right for an accused to elect trial by court martial to all but the most minor cases (where there is no possibility that penal consequences will be awarded).[82] An accused will now have an automatic right to elect trial by court martial unless charged with one of five minor offences. Even in those cases a right to elect may still arise where the presiding officer believes a punishment greater than a fine in excess of 25% of basic monthly pay may be awarded should the accused be found guilty. This greater opportunity to choose trial by court martial is coupled with the 1997 reform of ensuring that all accuseds have the opportunity to consult legal counsel, free of charge, prior to making an election.[83] The result is a greater opportunity for the accused to make an informed choice when the right to elect the type of service tribunal arises.

- limitation period

  Narrowing the limitation period by either requiring that all summary trials commence within one year after the day on which the service offence is alleged to have been committed or by allowing the accused the benefit of a shorter civilian limitation period where a civil offence is incorporated into the Code of Service Discipline.[84]

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[81] *QR&O* 108.14.

[82] *QR&O* 108.17.

[83] *QR&O* 108.18.

[84] Section 69 *NDA*; for example an accused charged under section 130 of the *NDA* may be alleged to have committed a summary offence under the *Criminal Code* which requires the trial to commence within 6 months of the date of the alleged offence to have been committed.

- summary trial review

  Creating an opportunity for the offender to have his summary trial findings reviewed by the presiding officers' superior or a superior officer within specified time periods.[45]

- punishments

  Reducing the severity of punishments that may be awarded and by restructuring the scheme of punishments in keeping with the summary trial's disciplinary as opposed to penal character. Most notably, *NDA* amendments have reduced the maximum period of detention that may be awarded at summary trial from 90 to 30 days. Regulatory reform will now restore a members pay and rank on completion of a sentence of detention, unless reduction in rank was also awarded as a punishment at the summary trial.

- summary trial documents

  Enhancing of, and allowing greater public access to, key summary trial documentation. New documents and standardized methods of record keeping are now in use.[46] Importantly, the public is now provided with access to the Registry of Disciplinary Proceedings in a manner that is similar to the access provided by registries of civil courts of criminal jurisdiction.

- presiding officer training

  Requiring that all presiding officers be trained and certified in the administration of the *Code of Service Discipline* in accordance with a curriculum established and taught by the Judge Advocate General by 1 April 2000.[47]

THE SUMMARY TRIAL YEAR IN REVIEW: 1 SEPTEMBER 1999 TO 31 MARCH 2000

Between 1 September 1999 and 31 March 2000 466 summary trial proceedings were initiated.

Of these 466 summary trial proceedings; 23 (4.93%) were referred to be tried by Court Martial, 7 (1.5%) resulted in the member electing to be tried by Court Martial and 10 (2.15%) cases the presiding officer exercised the discretion not to proceed. The remaining 426 cases were tried by summary trial.

- 344 of the trials were conducted in English and 82 were conducted in French.
- 247 (57.98%) of the trials were tried by Delegated Officer and 154 cases (36.15%) were tried by Commanding Officer. The remaining 25 cases were tried by Superior Commander

[45] *QR&O* 108.45 and 116.02 which allows review by the CDS, or a commander of a command or formation.

[46] *QR&O* 108.15, 108.42.

[47] *QR&O* 101.09, with exceptions only for "urgent operational requirements".

- In total 542 charges were considered during the 426 summary trials conducted.
- A guilty finding was made with respect to 466 (85.98%) of the charges. A not guilty finding was made with respect to 53 (9.78%) of the charges tried. The remaining charges were not proceeded with or stayed.
- The types of offences that were most frequently tried were Absence without Leave (162 cases; 29.89%) and Conduct to the Prejudice of Good Order and Discipline (241 cases; 44.46%).
- The types of punishment most frequently awarded were a Fine (260 cases; 52%) and Confinement to Ship or Barracks (123 cases; 24.6%). Detention was awarded in 10 (2%) cases.

A detailed statistical review of summary trial statistics can be found at Annex D.

Chapter 5

THE COURT MARTIAL

THE PURPOSE OF THE COURT MARTIAL

A *court martial*, as the name suggests, is a formal military court presided over by a legally qualified military judge. The court martial is designed to deal with more serious offences and is conducted in accordance with rules and procedures similar to those followed by civilian criminal courts. Courts martial are designed to be portable and are capable of being held anywhere in the world. During this reporting period courts martial were held throughout Canada as well as Macedonia, Bosnia and Germany. The prosecution is conducted by a legally trained and qualified legal officer employed within the office of the Director of Military Prosecutions (DMP). Members facing a court martial are entitled to a lawyer free of charge from the Director of Defence Counsel Services (DDCS).[11] An accused member may also retain a civilian lawyer funded either at the member's own expense or by a provincial legal aid plan should the accused successfully meet the respective plans' application criteria.

TYPES OF COURTS MARTIAL

There are four types of courts martial:

- General Courts Martial;
- Disciplinary Courts Martial;
- Standing Courts Martial; and
- Special General Courts Martial.

General Courts Martial and Disciplinary Courts Martial consist of a military judge and a panel of members, who are roughly analogous to a judge and jury in a civilian criminal court. For General Courts Martial the panel

[11] *QR&O* 101.20.

consists of five members, and for Disciplinary Courts Martial the panel consists of three members.[89] The panel is comprised entirely of officers unless the accused member is a non-commissioned member (NCM). In that case, the panel of the General Court Martial must include two non-commissioned members of the rank of warrant officer or above and in the case of a Disciplinary Court Martial one non-commissioned member of the rank of warrant officer or above.[90] In both types of court martial the panel is responsible for making the finding on the charges (i.e. guilty, not guilty, etc.) and the military judge is responsible for making legal rulings and imposing sentence.

Standing Courts Martial and Special General Courts Martial, while differing in names, are identical in composition. These courts are presided over by a military judge sitting alone.[91] The military judge makes both the finding on the charges and imposes a sentence if there is a finding of guilt.

The Special General Court Martial tries civilians who are subject to the *Code of Service Discipline*.[92]

JURISDICTION OF COURTS MARTIAL

The *Code of Service Discipline* applies to a broad range of persons. While the *Code of Service Discipline* primarily applies to CF members, civilians do on occasion become subject to Canadian military law and therefore triable by court martial.[93] However, for the most part, it is the officers and non-commissioned members of the regular and reserve forces that are liable to be dealt with by court martial and summary trial.[94] In the case of courts martial, jurisdiction over the person varies depending upon the status (military or civilian) and, where applicable, the military rank of the accused. General Courts Martial have jurisdiction over any person who is liable to be charged, dealt with and tried on a charge of having committed a service offence (the term any person includes both military and civilian personnel).[95]

Standing Courts Martial may try any officer or non-commissioned member who is liable to be charged, dealt with and tried on a charge of having committed a service offence.[96] The jurisdiction of Disciplinary Courts Martial is limited to officers of or below the rank of major and non-commissioned members.[97]

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[89] Sections 167(1) and 170(1) *NDA*.

[90] Sections 167(7) and 170(4) *NDA*.

[91] Sections 174 and 177 *NDA*.

[92] Section 176 *NDA*.

[93] Section 60(1) *NDA*, *QR&O* 102.09.

[94] See sections 60–65 *NDA* and *QR&O* 102 for a complete list.

[95] Section 166 *NDA*.

[96] Section 173 *NDA*.

[97] Section 169 *NDA*.

As mentioned earlier, Special General Courts Martial may try only civilians.[98]

Courts martial may try accused persons for all offences contained within the *Code of Service Discipline*. The *Code of Service Discipline* did not permit the trial of sexual assaults occurring within Canada; however, effective 1 September, 1999 courts martial now have jurisdiction to try sexual assault offences wherever they may have occurred.[99]

Another important recent area of reform impacting on court martial jurisdiction is the elimination of the three-year limitation period. So as not to frustrate disciplinary action in respect of service offences that are either not reported or disclosed within this period, or are complex and lengthy to investigate, the three-year limitation period has been repealed. In cases where the offence is a civil offence that has been incorporated into the *Code of Service Discipline* pursuant to section 130 *NDA*, the accused will have the benefit of any applicable civilian limitation period.[100]

POWERS OF PUNISHMENT

The maximum custodial sentence that can be imposed by a Disciplinary Court Martial (DCM) is imprisonment for less than two years.[101] The maximum punishment that could be awarded by a DCM is the punishment of dismissal with disgrace from Her Majesty's service. A General Court Martial may impose any punishment authorized by the *NDA*, including imprisonment for life.[102] Standing Courts Martial may impose a maximum period of imprisonment of up to two years less a day and a maximum punishment of dismissal with disgrace from the CF.[103] The Special General Court Martial is limited in its punishment powers to a fine or imprisonment.[104]

A most significant amendment to the powers of punishment available to courts martial during this reporting period was the abolition of the death penalty.

THE MAJOR AREAS OF COURTS MARTIAL REFORM

The major areas of court martial reform which become effective during this reporting period concern:

- court martial administration

  court martial administration was improved through the creation of the position of the Court Martial Administrator (CMA).[105] Previously

[98] Section 176 *NDA*.

[99] Section 70 *NDA*.

[100] See sections 60(2) and 69 *NDA*.

[101] Section 172 *NDA*.

[102] Sections 139 and 166 *NDA*.

[103] Sections 139 and 175 *NDA*.

[104] Section 178 *NDA*.

[105] Section 165.18 *NDA*.

the chain of command was involved in the decision whether to convene a court martial and the members of court martial panels were appointed by the Chief Military Judge. Under recent amendments the CMA will convene courts martial when a charge is preferred by the Director of Military Prosecutions. The CMA also appoints the members of DCM and GCM court martial panels.

⊕ panel composition

The participation of senior non-commissioned members to sit as panel members in cases where the accused is a non-commissioned member,[106] thereby adding an important dimension to court martial panel composition by better reflecting the spectrum of individuals responsible for the maintenance of discipline and morale, is a most significant and leading edge reform amendment.

⊕ jurisdiction

Enhancing jurisdiction by repealing the limitation on the trial of sexual assaults[107] occurring in Canada and modernizing limitation periods by eliminating the three year limitation period unless the accused may benefit by any applicable civilian limitation periods where a civil offence is incorporated into the *Code of Service Discipline*,[108] is a significant step to parallel the civilian system.

⊕ punishment reform

By continuing the process of punishment reform which began in 1997 through various changes including:

- removing the monetary limits on fines that may be imposed at courts martial,[109]
- reducing the period of detention that may be imposed from 2 years to 90 days at courts martial,[110]
- limiting the reduction of rank for non-commissioned members sentenced to detention for the period of detention only,[111]
- eliminating the mandatory included punishments of dismissal and dismissal with disgrace for any officer sentenced to imprisonment,[112]
- making previously mandatory included punishments discretionary,[113] and
- abolishing the death penalty.

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[106] See section 167, 170 *NDA*.

[107] Section 70 *NDA*.

[108] Section 69 *NDA*.

[109] Section 145 *NDA*.

[110] Section 142 *NDA*.

[111] Sections 140.1, 142 *NDA*.

[112] Section 140.1 *NDA*.

[113] See section 140.1, 140.2 *NDA*.

⊕ trial procedure

The court martial trial procedure has been modernized by eliminating the position of "President" of court martial panels and by authorizing the presiding military judge at a General or Disciplinary Court Martial, rather than the President, to make decisions of a legal nature and to determine the sentence.[114]

⊕ court martial legislative status

Statutorily establishing courts martial as having the same rights, powers and privileges as are vested in a superior court of criminal jurisdiction with respect to; the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and all other matters necessary or proper for the due exercise of its jurisdiction.[115]

COURTS MARTIAL IN REVIEW: 1 SEPTEMBER 1999 TO 31 MARCH 2000

There were 27 courts martial during the 7 month reporting period. All were Standing Courts Martial. By way of comparison there were 52 courts martial in 1999, 35 in 1998 and 42 in 1997.

During this reporting period one court martial each was held in Germany, Macedonia and Bosnia and the remaining 24 courts martial were held in Canada.

Twenty-one courts martial were held in English and six were in French.

As reported by DMP, the largest distinct group of charges related to property offences involving fraud, theft or forgery.

In 20 cases the accused person was found guilty of one or more offences. In the remaining 7 cases the accused person was acquitted of all charges.

Of the 20 cases in which the offender was sentenced, a fine was the type of punishment most frequently awarded.

As further noted in the DMP report, the current system has been in place for only a short time period and it would be premature to draw any firm conclusions from these statistics. It is anticipated that an increasingly detailed trend analysis of courts martial statistics may commence in the next Annual Report.

Further details of the courts martial can be found in Annex E as well as in the DMP Annual Report at Appendix 2.

[114] Sections 191, 192, 193 *NDA*.

[115] Section 179 *NDA*.

Chapter 6

APPEALS FROM COURTS MARTIAL: THE COURT MARTIAL APPEAL COURT OF CANADA AND THE SUPREME COURT OF CANADA

6.1 THE APPELLATE PROCESS

Where a person has been tried by court martial, the *NDA* sets out the rights of appeal of both the offender and the Minister. Such appeals are heard by the Court Martial Appeal Court of Canada (CMAC). The grounds of appeal may include: [116]

- the severity of the sentence, unless the sentence is one fixed by law;
- the legality of any finding of guilty;
- the legality of the whole or any part of the sentence;
- the legality of a finding of unfit to stand trial or not responsible on account of mental disorder;
- the legality of certain dispositions made as a result of a finding of unfit to stand trial or not responsible on account of mental disorder (i.e. custody or treatment dispositions);
- the legality of a direction to retain the applicant in pre trial custody, and;
- the legality of a direction to retain the appellant in custody pending appeal.

[116] See generally sections 159.9, 228-231, 238-243, 248.2 *NDA*.

THE COURT MARTIAL APPEAL COURT

The CMAC consists of federally appointed judges from the Federal Court of Canada or the superior courts of the provinces who are designated by the Governor in Council.[117] CMAC judges are civilian. The CMAC may sit and hear appeals at any place and shall hear appeals by a panel of three judges sitting together.[118]

THE SUPREME COURT OF CANADA

The decisions of the CMAC may be appealed to the Supreme Court of Canada.

Appeals arising from a decision of the CMAC may be made on any question of law on which a judge of the CMAC dissents or on any question of law, if leave to appeal is granted by the Supreme Court of Canada.[119]

The Supreme Court of Canada is also composed entirely of civilian judges.

APPEALS BY CF MEMBERS REPRESENTED BY THE DIRECTOR OF DEFENCE COUNSEL SERVICES

Importantly, CF members who are appealing a court martial decision now have the opportunity to be represented, free of charge, by legal officers from the Office of the Director of Defence Counsel Services.

Effective 1 September, 1999 an Appeal Committee has been created by *QR&O*. The Appeal Committee, upon application of a CF member shall approve the provision of legal counsel by the Director of Defence Counsel Services in cases were the appeal has professional merit.[120]

On 15 October 1999 the Supreme Court of Canada, heard and granted the appeal of Master Corporal Brown. The Court Martial Appeal Court decision overturning the Standing Court Martial's imposition of a stay was successfully appealed.

This case is particularly noteworthy because it marked the first time that a CF member was represented at the Supreme Court of Canada by a CF lawyer. In this case Master Corporal Brown was represented by an officer of the Office of the Director of Defence Counsel Services.

[117] Section 234 *NDA*.

[118] Section 235 *NDA*.

[119] Section 245 *NDA*.

[120] *QR&O* 101.21.

THE COURT MARTIAL APPEAL COURT YEAR IN REVIEW: 1 SEPTEMBER 1999 TO 31 MARCH 2000

During the reporting period four appeals were heard by the CMAC and one appeal was heard by the Supreme Court of Canada.

In four of the five cases the appellant was the CF member.

At the CMAC level, both the legality of the guilty finding and sentence were appealed in one case. In the remaining three CMAC cases the legality or severity of sentence was appealed. As noted in the DMP Annual Report contained at Appendix 2, one emerging theme is that, although possible as a matter of law, a custodial sentence will rarely be imposed for a first time conviction of a property related offence.

The fifth case appealed was that of Master Corporal Brown. As stated above, the Supreme Court of Canada overturned the decision of the CMAC and allowed the Standing Court Martial's finding of entrapment to stand

More details of the appeals can be found at Annex F and in the DMP Report at Appendix 2.

Chapter 7

JUDGE ADVOCATE GENERAL INITIATIVES IN RELATION TO THE SUPERINTENDENCE AND REVIEW OF MILITARY JUSTICE

7.1 OVERVIEW OF THE RESPONSABILITIES OF THE JUDGE ADVOCATE GENERAL FOR MILITARY JUSTICE

As earlier observed upon, Parliament has defined the roles and responsibilities of the Judge Advocate General in Canadian law through recent *NDA* amendment. Now, from the perspective of military justice, the Judge Advocate General:

- has the superintendence of the administration of military justice in the Canadian Forces,[121] and
- shall conduct or cause to be conducted, regular reviews of the administration of military justice.[122]

In the following sections some of the initiatives undertaken during this reporting period in relation to the superintendence and review of military justice will be outlined.

7.2 THE CREATION OF THREE COMMITTEES RELATING TO MILITARY JUSTICE

To assist with the superintendence and review responsibilities the following committees were created by the Judge Advocate General and have met during the reporting period;

[121] Section 9.2(1) *NDA*.

[122] Section 9.2(2) *NDA*.

The Military Justice Stakeholders Committee

This Committee is concerned with long term and strategic issues pertaining to the military justice system. It provides a forum where existing military justice policies and processes can be reviewed and commented upon.

Where necessary or advisable, the Committee may comment and make suggestions for changes which may be studied and acted upon by the other committees. The Committee members include the Chief Justice of the Court Martial Appeal Court of Canada, the Minister of National Defence, the Chief Military Judge (CMJ), the Chief of the Defence Staff (CDS), the Vice Chief of Defence Staff (VCDS), the Director of Military Prosecutions (DMP), the Director of Defence Counsel Services (DDCS), the Canadian Forces Provost Marshall (CFPM) as well as the Judge Advocate General.

The CF Code of Service Discipline Committee

This Committee is a forum available to senior officers and senior non-commissioned members — the groups that are most responsible for, and interested in, a military justice system which ensures the maintenance of a disciplined armed forces and the promotion of efficiency, effectiveness, morale and esprit de corps. The members of this Committee include, the CDS, the CF Chief Warrant Officer (CWO), the VCDS, the Assistant Deputy Minister (Human Resources — Military) (ADM(HR-Mil)), the CWO ADM(HR-Mil), the CFPM, the DMP, the Chiefs and the senior non-commissioned member of the Maritime, Land and Air Staffs, and the Judge Advocate General.

The Judge Advocate General Advisory Panel on Military Justice

This is a panel of established and experienced civilian judges and criminal lawyers who can provide fresh, objective, contemporary ideas and perspective to the Judge Advocate General, particularly with respect to any draft military justice policies referred to them. Membership includes the Honourable Mr Justice W.R.E. Goodfellow (Supreme Court of Nova Scotia), Mr. Daniel Bellemare, Q.C., the Federal Assistant Deputy Attorney General of Canada — Criminal Law, Mr. Terrence Matchett, Q.C., the Assistant Deputy Minister Criminal Justice (Alberta), and two senior defence counsel, Mr. Guy Cournoyer and Craig Garson, Q.C., from the Quebec and Nova Scotia bars respectively.

JUDGE ADVOCATE GENERAL/CHIEF OF REVIEW SERVICES REVIEW OF THE MILITARY JUSTICE SYSTEM

While the military justice system is under a continual state of superintendence and review one of the initiatives currently being undertaken is the creation of a review template or framework that will allow the key aspects of the military justice system to be monitored and reviewed at defined intervals through a variety of methods including statistical analysis, independent professional analysis and qualitative and quantitative standardized reporting procedures by some of the system's key actors.

By creating this template a defined and structured system of review can be incorporated within the administration and superintendence of military justice.

Another mechanism for reviewing the administration of military justice can be found in the "FY 00/01 Strategic Letter — Office of the Judge Advocate General."[123] In this document the strategic goals of the Office of the Judge Advocate General relating to the military justice system are identified and broken down into tasks and initiatives. Each initiative has been allocated resources and milestones which must be met within a defined timeline so that the strategic goals relating to the administration of military justice are realized. The tracking of work related to the initiatives is accomplished through the JAG Performance Measurement System — a software program. It is hoped in the near future that this Performance Measurement System will be website accessible.

CERTIFICATION TRAINING FOR PRESIDING OFFICERS OF SUMMARY TRIALS

The "Report on the Special Advisory Group on Military Justice and Military Police Investigation Services"[124] noted that they had encountered a perception amongst non-commissioned members that officers were not familiar with the rights of accused CF members. The Special Advisory Group also noted that there was inadequate training in military law and the military justice system which resulted in Presiding Officers being less confident in the discharge of their summary trial duties.

Consequently the Special Advisory Group recommended:

> "that increased training and education be introduced for all commanding officers and delegated officers to ensure that they are knowledgeable about their roles in the military justice system and competent to perform them ... [and they] should not be permitted to preside at summary trial unless certified to do so by the Judge Advocate General."[125] (brackets added)

Based upon this recommendation, regulations[126] were created which now effectively require all presiding officers to be trained in, and certified as qualified to perform their duties in, the administration of the *Code of Service Discipline* by 1 April, 2000. Should a superior or commanding officer not be duly certified by 1 April 2000 that officer will not be able to assume his or her respective duty.[127]

To meet the demands of this regulatory requirement, the Office of the Judge Advocate General created a curriculum for the "Certification Training of Presiding Officers Program" consisting of a 20 hour pre course self study

[123] 15 December 1999 found at www.dnd.ca/jag under menu item "Office of the Judge Advocate General".

[124] March, 1997.

[125] Recommendation #23, "Report of the Special Advisory Group on Military Justice and Military Police Investigation Services", March, 1997 p. 89.

[126] *QR&O* 101.09.

[127] In cases of "urgent operational requirements" the CDS may delay the required training of an officer.

program and test, and a two day mandatory attendance classroom instructed course followed by a further test. Precourse self study material includes the Judge Advocate General publication "Military Justice at the Summary Trial Level".[128] Some of the topics covered in the manual include; the purpose of military justice, the history of summary trial proceedings, the framework of the Canadian military justice system, and fairness and the application of the *Charter*. The classroom section includes instruction from the Judge Advocate General publication "Certification Training Desk Book".

Beginning on 9 September, 1999 Certification Training under the instruction of CF legal officers was undertaken throughout Canada and various locations world wide.

Importantly, students included not only delegated, commanding and superior officers but a number of senior non-commissioned officers as well. Further, General Officers, including the CDS, completed this training.

As indicated at Annex G, 2097 officers were certified as having been trained in the administration of the *Code of Service Discipline*. Also during this reporting period 309 non-commissioned officers, while not certified, attended the course.

The Certification Training Program marks the most comprehensive training and education program on the *Code of Service Discipline* ever undertaken by the CF. The Certification Training Program now sets an objective standard of knowledge which must be possessed by all presiding officers.

OTHER MILITARY JUSTICE TRAINING FOR CF MEMBERS

In addition to the Certification Training Program for Presiding Officers all CF personnel, but particularly personnel performing specific functions in the administration of military justice at the unit level, are required to be trained on relevant aspects of the Code of Service Discipline.

Consequently, on 9 Sep 1999 the Chief of Defence Staff directed that all CF Recruit Education and Training System (CFRETS) based training incorporate an enhanced military justice component into existing courses and that all CF members be given training at the unit level.[129]

Unit level training has focused on the purpose of a military system of justice and members' rights and entitlements under the *Code of Service Discipline*.

One of the key documents for unit level training is the Judge Advocate General publication "*The Code of Service Discipline* and Me"[130]

[128] A downloadable copy can be found at the Judge Advocate General Website, www.dnd.ca/jag.

[129] CANFORGEN 081/99 CDS 09 Sep 99.

[130] Found on the Judge Advocate General website www.dnd.ca/jag under "Military Justice".

JUDGE ADVOCATE GENERAL POLICIES

Most policies relating to military justice have been created either by DMP or DDCS for use by their respective offices as a consequence of instructions issued by the Judge Advocate General during this reporting period.

A copy of the instructions were subsequently republished as JAG directives and can be found in Annex H.

COMMUNICATIONS AND ADVANCEMENT OF MILITARY JUSTICE EDUCATION

The Office of the Judge Advocate General has been active in a variety of ways communicating and educating persons, within and outside of the Canadian Forces on the military justice system. A Judge Advocate General Communications Plan has been created. The Communications Plan identifies the key messages related to military justice and the vehicles through which the messages will be communicated.

Members of the media were briefed in Ottawa on 2 September 1999 on the military justice system. Additionally, presentations on the military justice system were made to the Criminal Lawyers' Association, the American Bar Association, the International Society for Military Law, the Conference of the Commonwealth Association for Armed Forces Lawyers, the United States Commander in Chief of the Pacific Military and Operations Law Conference, and to various members of the British Army and the Royal Air Force. Various articles have also appeared in the CF newspaper the Maple Leaf, and the Criminal Law Quarterly.

The Judge Advocate General website has been created and contains much information on military justice. The site can be found at www.dnd.ca/jag.

As mentioned earlier, the publications "Military Justice at the Summary Trial Level" and "*The Code of Service Discipline* and Me" are website accessible.

Most importantly, the Judge Advocate General has spearheaded the creation of the National Military Law Section within the Canadian Bar Association. The National Military Law Section is a forum where military and civilian lawyers, legal scholars and jurists can share, exchange and develop ideas relating to military law including military justice. This important development has provided a long overdue link between civilian and military legal communities.

DMP has also participated in the Federal, Provincial and Territorial Head of Prosecutions Committee. This Committee consists of the heads of Prosecutions for; the Federal Department of Justice, the Department of National Defence, the Provincial prosecution services, the Territorial prosecution services and the Nunavut prosecution services. DDCS and his officers are members and have participated in the Criminal Lawyers Association.

Chapter 8

CONCLUDING REMARKS

This First Annual Report by the Judge Advocate General to the Minister of National Defence on the administration of military justice covers the most dynamic period of reform since the passage of the National Defence Act (*NDA*) in 1950.

This most significant reporting period covers the changes that have been undertaken as of 1 September, 1999 — the date in which the majority of *NDA* amendments and necessary implementing regulations took effect.

Key Areas of Reform

Some of the key changes to the military justice system include the following:

- Clarifying the roles and responsibilities of the Minister of National Defence, the Judge Advocate General and military judges by:
  - Divesting the Minister of many judicial, and quasi judicial, pre and post trial, roles so the Minister's executive function can be insulated from the day to day operation of the military justice system.
  - Clearly defining the appointment, duties, powers and functions of the Judge Advocate General. The Judge Advocate General has now been given express responsibility to superintend the military justice system and, as stated in the *NDA*, is "responsible" to the Minister in the performance of his duties.
  - Enhancing military judicial independence through the creation of mechanisms such as the Inquiry, Renewal, and Compensation Committees.
- Clearly separating executive, investigative, prosecution, defence and judicial functions by;
  - Creating the Office of the Director of Military Prosecutions (DMP) as the only authority within the Canadian Forces to decide whether to "prefer" or proceed with charges to Court Martial.

- Creating the necessary legislative buffers around DMP to ensure that the proper exercise of prosecutorial discretion is not inadvertently interfered with by the military chain of command.
- Creating the Office of the Director of Defence Counsel Services (DDCS) independent from the military chain of command, to represent the interests of CF members during and before disciplinary proceedings.
- Enhancing the independence of DMP and DDCS through the tenured appointment of DMP and DDCS by the Minister for a defined period of time.
- Replacing the military chain of command with the Court Martial Administrator — a civilian — in the courts martial convening process.

⊕ Modernizing the court martial and summary trial process by:

- Allowing senior non-commissioned officers to sit as panel members when the accused is a non-commissioned member and is being tried before a Disciplinary or General Court Martial.
- Enhancing courts martial jurisdiction by repealing the limitation on the trial of sexual assaults occurring within Canada and removing the three year limitation period.
- Reforming courts martial punishments by eliminating the death penalty, making previously mandatory included punishments discretionary, limiting the reduction in rank for non-commissioned members sentenced to detention for the period of detention only.
- Eliminating the position of "President" of court martial panels and authorizing the military judge at a General or Disciplinary Court Martial, rather than the President, to make decisions of a legal nature and to determine sentence.
- Statutorily establishing courts martial as having the same rights powers and privileges as are vested in a superior court of criminal jurisdiction in a variety of matters necessary or proper for the due exercise of its jurisdiction.
- Restricting the offence jurisdiction of summary trials to those offences that are less serious in nature.
- Extending the right for an accused to elect trial by court martial to all but the most minor cases where there will be no possibility that penal consequences will be awarded.
- Widening the opportunities for an accused, or a person subject to investigation, to access the independent legal advice of DDCS free of charge.
- Modernizing summary trial limitation periods by requiring summary trials to commence within one year after the day on which the service offence is alleged to have occurred, or by allowing the accused the benefit of a shorter civilian limitation period where a civil offence is incorporated within the *Code of Service Discipline.*

- Enhancing, and allowing greater public access to, key summary trial documentation.
- Requiring all presiding officers at summary trial to be trained and certified in the administration of the *Code of Service Discipline*.

⊕ Strengthening oversight and review to ensure that military justice is fair and meets the expectations of Canadians by:

- Establishing various mechanisms in the *NDA* which ensure civilian authority over the military justice system. This is done, in part, by requiring either the Governor in Council or, the Minister to, appoint military judges, the Judge Advocate General, the Director of Military Prosecutions, and the Director of Defence Counsel Services.
- Clearly stating that the Judge Advocate General is "responsible to the Minister in the performance of the Judge Advocate General's duties and functions" thereby removing the Judge Advocate General from both the military and civilian chains of command.
- Requiring the Judge Advocate General to report annually to the Minister on the administration of military justice.
- Requiring that the amendments to the *NDA* be reviewed every five years by Parliament.

These simple points illustrate a few of the ways in which the military justice system has been reformed and improved. The reforms have gone a considerable distance to enhance the fairness, transparency, and constitutionality of a rejuvenated military justice system.

Judicial Proceedings

Under this new system, between 1 September 1999 and 31 March 2000, 466 summary trial proceedings were initiated resulting in 426 summary trials being conducted throughout Canada, Bosnia, Italy, Macedonia, Kosovo and East Timor. Additionally 27 courts martial were conducted in Canada, Germany, Bosnia and Macedonia, and 5 appeals were heard by either the Court Martial Appeal Court of Canada or the Supreme Court of Canada.

Judge Advocate General Initiatives

Inextricably linked to the modernization process have been a variety of initiatives undertaken by the Office of the Judge Advocate General.

Despite the Office of the Judge Advocate General being effectively 25% below full manpower strength, financial and personal resources have been committed, on a first priority basis, to the strategic goal of restoring the credibility of the military justice system.

Within a relatively short time period the Director of Military Prosecutions has established the necessary relationships and required processes which has assisted her in performing her duties within the new statutory and regulatory framework. Similarly the Director of Defence Counsel Services, (DDCS) has been performing his duties without incident or interference from the military chain of command. During the reporting period DDCS represented 78% of all accused at courts martial and through the 24 hours

a day/seven day a week telephone service the Office of the DDCS has fielded 376 telephone calls from CF members around the world in need of legal advice.

New policies have been created so that fundamental and important aspects of the administration of military justice such as solicitor/client privilege, post-charge screening, disclosure, accountability and independence are established, standardized and publicized in a transparent fashion.

A number of committees including the Military Justice Stakeholders Committee, chaired by the Chief Justice of the Court Martial Appeal Court of Canada, the Code of Service Discipline Committee co-chaired by the CDS and the Judge Advocate General, and the Judge Advocate General Advisory Panel on Military Justice, have been created to develop fresh, objective and contemporary ideas to assist in the overall reform process.

Legal officers from the Office of the Judge Advocate General instructed 2097 officers and 309 non-commissioned officers during certification training on the administration of the *Code of Service Discipline*. Through assistance from the Office of the Judge Advocate General all CF members are undertaking additional educational training on the military justice system. Generally speaking, CF officers now possess a better understanding of the administration of the *Code of Service Discipline*.

To facilitate the education and understanding of military justice, the Office of the Judge Advocate General has created its own website and published the following documents; "Military Justice At the Summary Trial Level", "*The Code of Service Discipline* and Me", the "Certification Training Deskbook" and created two CD Roms which include these documents and lesson plans for the Unit Level Discipline training program.

As part of an important step towards increasing the interaction between the military and civilian legal communities and to better share and develop ideas relating to military justice, the Canadian Bar Association has created the National Military Law Section. Various Judge Advocate General officers have participated in a number of other organizations including the Head of Prosecution Group, the Criminal Lawyers' Association, the American Bar Association, the International Society for Military Law and the Commonwealth Lawyers' Conference.

The recent legislative and regulatory changes coupled with the many initiatives undertaken by the Office of the Judge Advocate General during the reporting period have significantly modernized the military system of justice.

Clearly, we have entered a new era with respect to military justice.

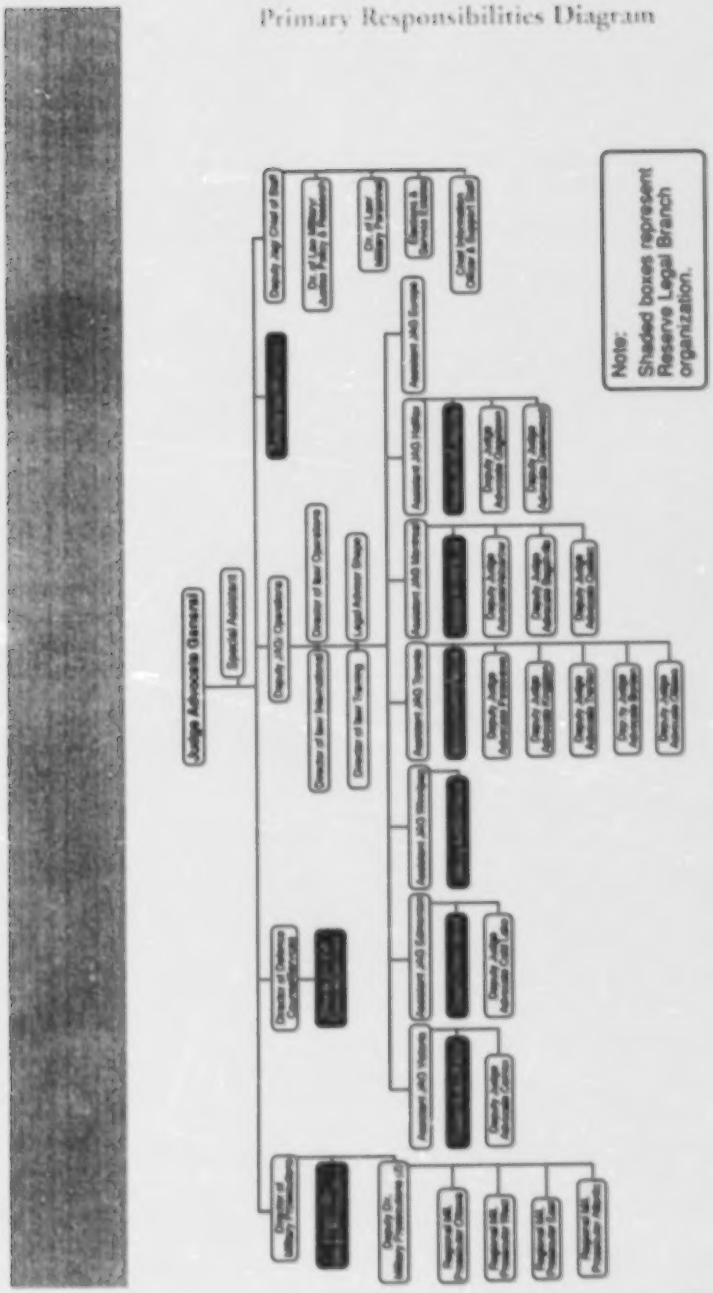
The emphasis over the coming year will be to continue to build confidence in the new military justice system in a manner that is efficient, transparent and, above all, just.

In doing so the new military justice system will continue to contribute to the overall strengthening of the Canadian Forces as a vital national institution.

Annex A

ORGANIZATION CHART OF THE
RESERVE AND REGULAR FORCE
JUDGE ADVOCATE GENERAL
OFFICE

Primary Responsibilities Diagram


Judge Advocate General
Deputy Judge Advocate General
Deputy Chief of Staff
Director of Defence Counsel Services
Director of Law Reform
Director of Law Operations
Director of Law International
Director of Law Training
Legal Advisor Chaplain
Deputy JAG Operations
Assistant JAG Reserves
Assistant JAG Training
Assistant JAG Operations
Assistant JAG Law Reform
Assistant JAG Military Justice
Assistant JAG Defence Counsel Services
Deputy Judge Advocate (Reserves)
Deputy Judge Advocate (Training)
Deputy Judge Advocate (Operations)
Deputy Judge Advocate (Law Reform)
Deputy Judge Advocate (Military Justice)
Deputy Judge Advocate (Defence Counsel Services)
Deputy Judge Advocate (Chaplain)
Deputy Judge Advocate (Legal Advisor)
Deputy Judge Advocate (Law International)
Deputy Judge Advocate (Law Training)
Deputy Judge Advocate (Law Operations)
Deputy Judge Advocate (Law Reserves)
Deputy Judge Advocate (Law Military Justice)
Deputy Judge Advocate (Law Defence Counsel Services)
Deputy Judge Advocate (Law Law Reform)
Deputy Judge Advocate (Law Chaplain)
Deputy Judge Advocate (Law

Annex B

MAPS AND ADDRESSES/PHONE NUMBERS OF JUDGE ADVOCATE GENERAL OFFICES

Annex B

ADDRESSES/PHONE NUMBERS OF JUDGE ADVOCATE GENERAL OFFICES

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Office of Director of Military Prosecutions 305, Rideau Street Ottawa, Ontario K1A 0K2	TELEPHONE: (613) 996-5723 FAX: (613) 995-1840
Asaistant Judge Advocate General Central Region P.O. Box 47 5775 Yonge Street North York, Ontario M2M 4J1	CSN: 2136-634-5252 TELEPHONE: (416) 733-4681 EXT 5252 FAX: (416) 733-5324
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Deputy Judge Advocate Canadian Forces Base Kingston Building C-39, 6 Red Patch Ave Kingston, Ontario K7K 7B4	CSN: 2136-270-4303 TELEPHONE: (613) 541-5010 EXT 4303 FAX: (613) 540-8186
Deputy Judge Advocate Canadian Forces Base Petawawa Petawawa, Ontario K8H 2X3	CSN: 2136-677-5665 TELEPHONE: (613) 687-5511 EXT 5665 FAX: (613) 588-6373
Deputy Judge Advocate Canadian Forces Base Trenton P.O. Box 1000 Stn Forces Astra, Ontario K0K 3W0	CSN: 2136-827-7041 TELEPHONE: (613) 965-7041 FAX: (613) 965-7094

Québec

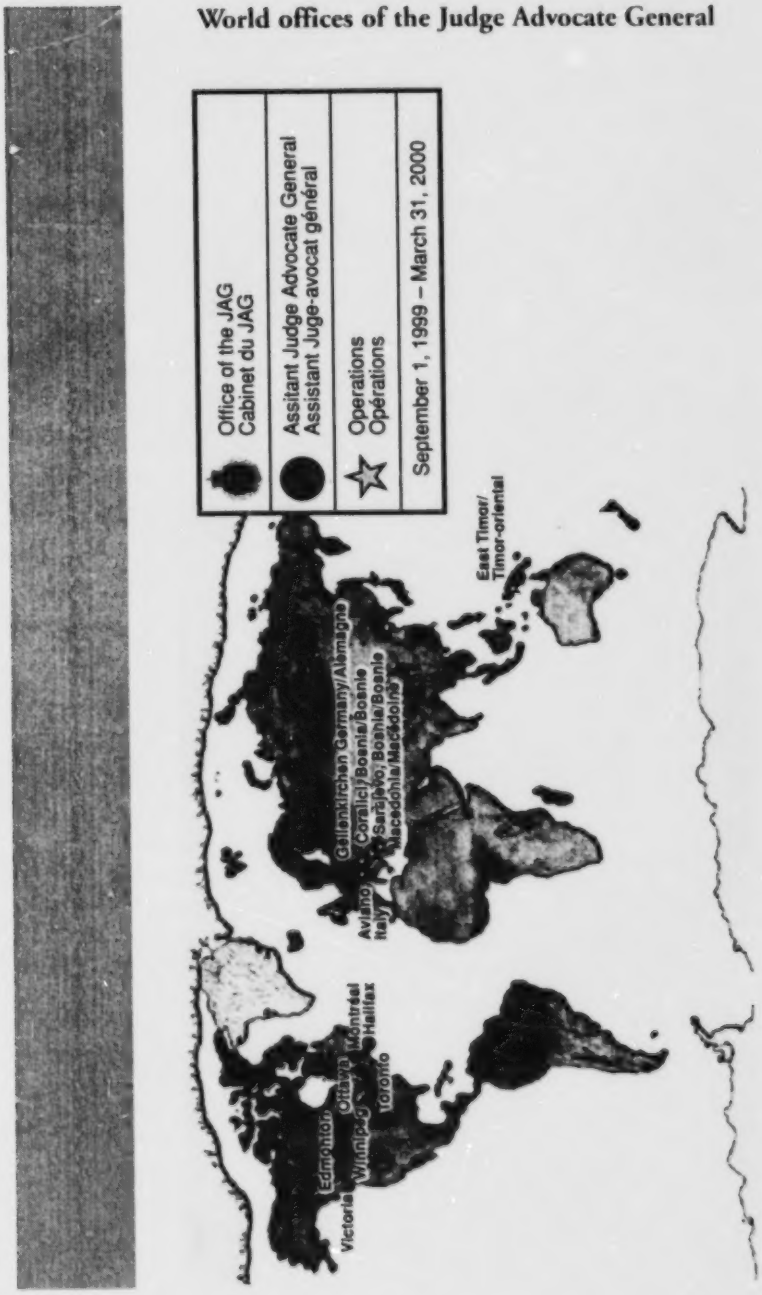
Mailing Address	*Telephone/Fax Numbers*
Assistant Judge Advocate General Building Pierre Lemoyne D'Iberville (2nd Floor)P.O. Box 600, Stn K Montréal, Quebec H1N 3R2	CSN: 2136-621-4028 TELEPHONE: (514) 252-2777 EXT 4028 FAX: (514) 252-2248
Deputy Judge Advocate (5 CMBG) Canadian Forces Base Valcartier Courcelette, Quebec G0A 1R0	CSN: 2136-666-5297 TELEPHONE: (418) 844-5000 EXT 5297 FAX: (418) 844-6606
Deputy Judge Advocate (Bagotville) 3 Wing Canadian Forces Base Bagotville PO Box 5000, Main Post Office Alouette QC G0V 1A0	CSN: 2136-661-4338 TELEPHONE: (418) 677-4000 EXT 4338 FAX: (418) 677-4168
Regional Military Prosecutor P.O. Box 1000 Stn Forces Courcelette, Quebec G0A 4Z0	CSN: 2136-666-5732 TELEPHONE: (418) 844-5000 EXT 5732 FAX: (418) 844-6606

Germany

Mailing Address	*Telephone/Fax Numbers*
Assistant Judge Advocate General Canadian Forces Support Unit (Europe) SELFKANT Caserne CFPO 5053 Belleville, Ontario K8N 5W6	TELEPHONE: 011-49-2451- 717165/717170 FAX: 011-49-2451-717174

Canadian offices of the Judge Advocate General

World offices of the Judge Advocate General



Annex C

ORGANIZATION CHART DISPLAYING RELATIONSHIP OF THE JUDGE ADVOCATE GENERAL TO THE MINISTER AND THE DEPUTY MINISTER OF NATIONAL DEFENCE, AND THE MILITARY CHAIN OF COMMAND

National Defence Headquarters

Minister of National Defence
Ombudsman
Deputy Minister National Defence
Chief of the Defence Staff
Judge Advocate General
Federal Coord for Y2K Contingency Planning
Vice Chief of the Defence Staff
Canadian Forces Provost Marshal
Assistant Deputy Minister (Information Management)
Director General Public Affairs
Chief Review Services
Defence Chief Scientific Advisor
Deputy Chief of the Defence Staff
Chief of the Maritime Staff
Chief of the Land Staff
Chief of the Air Staff
Assistant Deputy Minister (Human Resources – Military)
Deputy Minister Dept of Justice
DND/CF Legal Advisor
Assistant Deputy Minister (Policy)
Assistant Deputy Minister (Materiel)
Assistant Deputy Minister (Finance & Corporate Services)
Assistant Deputy Minister (Infrastructure & Environment)
Assistant Deputy Minister (Human Resources – Civilian)

Annex D

SUMMARY TRIAL YEAR IN REVIEW

STATISTICS:1 September to 31 March 00

Annex D

Summary Trial Reporting

Period 1 Sep – 31 Mar 00

Distribution	Number of Cases	Percentage
Number of direct referrals to Court Martial	23	4.93
Number of elections to be tried by Court Martial by the accused	7	1.50
Number of Summary Trials	426	91.42
Not proceeded with	10	2.15
Total	**466**	**100%**

Language of Summary Trials	Number of Cases	Percentage
Number in English	344	80.75
Number in French	82	19.25
Total	**426**	**100%**

Command	Number of Cases	Percentage
ADM (FIN CS)	1	0.23
ADM (HR-MIL)	25	5.87
ADM (IM)	8	1.88
AIR	17	3.99
DCDS	95	22.30
LAND	192	45.07
MARITIME	84	19.72

Command	Number of Cases	Percentage
ADM (MAT)	4	0.94
VCDS	0	0.00
Total	**426**	**100%**

Disposition by Case	Number of Cases	Percentage
Guilty	407	95.54
Not Guilty	19	4.46
Number of cases	**426**	**100%**

Findings by Charge	Number of charges	Percentage
Charge not Proceeded with	6	1.10
Guilty	466	85.98
Not Guilty	53	9.78
Charge Stayed	17	3.14
Total	**542**	**100%**

Summary of Charges

Article	Description	Number of charges	Percentage
83	Disobedience of Lawful Command	14	2.58
84	Striking or Offering Violence to a Superior	1	0.19
85	Insubordinate Behaviour	21	3.87
86	Quarrels and Disturbances	11	2.03
87	Resisting or Escaping from Arrest or Custody	2	0.37
90	Absence Without Leave	162	29.89
93	Cruel or Disgraceful Conduct	2	0.37
95	Abuse of Subordinates	3	0.55
97	Drunkenness	54	9.96
111	Improper Driving of Vehicles	1	0.19
114	Stealing	4	0.74
116	Destruction, Damage, Loss or Improper Disposal	1	0.19
117	Miscellaneous Offences	7	1.19

Article	Number of Description	charges	Percentage
129	Conduct to the Prejudice of GoodOrder & Discipline — Offences of sexual nature	2	0.37
129	Conduct to the Prejudice of Good Order & Discipline — Drugs/Alcohol	25	4.61
129	Conduct to the Prejudice of Good Order & Discipline — Election to be tried by CM Given (excl. cases reported in 129- Offences of sexual nature & 129-Drugs/Alcohol	116	21.40
129	Conduct to the Prejudice of GoodOrder & Discipline — Election to be tried by CM not Given (excl. cases reported in 129-Offences of sexual nature & 129-Drugs/Alcohol)	98	18.08
130	Service Trial of Civil Offences	18	3.32
Number of charges		**542**	**100%**

Authority	Number of Cases	Percentage
Commanding Officer	154	36.15
Superior Commander	25	5.87
Delegated Officer	247	57.98
Total	**426**	**100%**

Punishment (more than one type of punishment may be awarded in a case)	Number of Punishments	Percentage
Fine	260	52.00
Caution	34	6.80
Severe Reprimand	2	0.40
Confinement to ship or barracks	123	24.60
Detention	10	2.00
Reprimand	37	7.40
Reduction in rank	2	0.40
Stoppage of leave	5	1.00
Extra work and drill	27	5.40

Annex E

COURTS MARTIAL YEAR IN REVIEW
STATISTICS: 1 September 1999 to
31 March 2000

Annex E

Number of Courts Martial

Courts Martial Held Between 1 Sep 99 – 31 Mar 00	27

Courts Martial By Type

Type of Courts Martial	Number of Cases	Percentage
Standing Courts Martial	27	100%
Disciplinary Courts Martial	Ø	
General Courts Martial	Ø	
Special General Courts Martial	Ø	
Total	**27**	**100%**

Summary of Charges

Offences	Description	Number of Cases
s. 83 NDA	Disobeying a Lawful Command	1
s. 84 NDA	Striking a Superior Officer	1
s. 86 NDA	Quarrelling with a Person Subject to CSD	1
s. 90 NDA	Absent Without Leave	1
s. 95 NDA	Abuse of Subordinates	2
s. 97 NDA	Drunkenness	4
s. 111(1)(a) NDA	Improper Driving of Vehicles	1
s. 114 NDA	Stealing When Entrusted	8
s. 116 NDA	Sold Improperly Property of Forces	2
s. 117(f) NDA	An Act of a Fraudulent Nature	11

Offences	Description	Number of Cases
s. 124 NDA	Negligent Performance of Military Duty	1
s. 125(a) NDA	Willfully Made a False Entry	3
s. 129 NDA	An Act to the Prejudice	5
s. 129 NDA	Conduct to the Prejudice	3
s. 129 NDA	Neglect to the Prejudice	1
s. 130 NDA (4(1) CDSA)	Possession of substances	1
130 NDA (5 (1) CDSA)	Trafficking of substances	7
130 NDA (78 (1) CCC)	Taking an Explosive on a Civil Aircraft	1
s. 130 NDA (82(1) CCC)	Possession of an Explosive	1
s. 130 NDA (89 CCC)	Carrying a Concealed Weapon	1
s. 130 NDA (91(2) CCC)	Possession of a Restricted Weapon	1
s. 130 NDA (139(2) CCC)	Obstructing Justice	1
s. 130 NDA (173(1) CCC)	Indecent Exposure	1
s. 130 NDA (266 CCC)	Assault	3
s. 130 NDA (267(a) CCC)	Assault with a Weapon	1
s. 130 NDA (267(b) CCC)	Assault Causing Bodily Harm	2
s. 130 NDA (271 CCC)	Sexual Assault	1
s. 130 NDA (334 CCC)	Theft	7
s. 130 NDA (348(1)(B) CCC)	Breaking and Entering	5
s. 130 NDA (351 CCC)	Possession of a Break-in Instrument	1
s. 130 NDA (354(1)(a) CCC)	Possession of Property Obtained by Crime	2

Offences	Description	Number of Cases
s. 130 NDA (367 CCC)	Forgery	6
s. 130 NDA 368 CCC)	Uttering a Forged Document	4
s. 130 NDA (380(1)(B) CCC)	Fraud	12
s. 130 NDA (465(1)(c) CCC)	Conspiring to Commit Indictable Offence	1
Total Offences		**105**

Disposition By Case

Disposition	Number of Cases	Percentage
Found/Plead Guilty	20	74%
Not Guilty	7	26%
Total	**27**	**100%**

Sentences

(NOTE: More than one type of punishment can be included in a sentence.)

Punishment Type	Number of Cases
Reprimand	5
Severe Reprimand	4
Fine	17
Detention	3
Imprisonment	3
Reduction in Rank	2
Total	**34**

Language of Trial

Language	Number of Cases	Percentage
Trial in English	21	78%
Trial in French	6	22%
Bilingual Court	0	
Total	**27**	**100%**

Courts Martial By Geographic Location

Location	Number of Cases	Percentage
Canada	24	88%
Bosnia	1	4%
FRY of Macedonia	1	4%
Germany	1	4%
Total	**27**	**100%**

Courts Martial By Command

Command	Number of Cases	Percentage
CF Recruiting Education Training Systems	1	4%
Deputy Chief of Defence Staff	3	11%
Chief Land Staff	12	44%
Chief Air Staff	5	18%
Chief Maritime Staff	4	15%
NDHQ	1	4%
OTHER	1	4%
Total	**27**	**100%**

Annex F

COURT MARTIAL APPEAL
COURT YEAR IN REVIEW
STATISTICS: 1 September
1999 to 31 March 2000

Annex F

APPEALS

Court	Number of Cases
CMAC Appeals	4
Supreme Court of Canada Appeals	1
Total	**5**

APPEALS BY PARTY

Status of Appellant	Number of Cases
Appeals by Crown	1
Appeals by Offender	4
Total	**5**

NATURE OF APPEAL

Grounds	Number of Cases
Finding	1
Sentence (Severity or Legality)	3
Finding and Sentence	1
Total	**5**

DISPOSITION

Disposition	Number of Cases
Uphold Trial Decision	2
Overturn Trial Decision in whole or part	3
Total	**5**

Annex G

CERTIFICATION TRAINING YEAR
IN REVIEW STATISTICS:
1 September 1999 to
31 March 2000

Annex G

CERTIFICATION TRAINING

Number of Officers Certified — 1 Sep – 31 Mar 00	2097

Number of Members Trained By Rank Grouping

Grouping	Number	Percentage
Officers	2097	87%
Non-Commissioned Officers	309	13%
Total	**2406**	**100%**

Number of Officers Certified by Command

Command	Number	Percentage
CFRETS	374	17%
CLS	1005	48%
CAS	381	18.5%
CMS	337	16.5%
Total	**2097**	**100%**

Annex H

JUDGE ADVOCATE GENERAL
DIRECTIONS AND POLICIES

Annex H

Judge Advocate General

Directive

Directive # : 008/00	Original Date : 23 Mar 00	Update :
Subject : General in structions in respect of prosecutions	Cross Reference : Section 165.17(2) of NDA	

23 Mar 00

Distribution List

GENERAL INSTRUCTIONS IN RESPECT OF PROSECUTIONS

1. This general instruction is issued to the Director of Military Prosecutions pursuant to my authority under section 165.17(2) of the National Defence Act.

2. In accordance with the requirements of an open, transparent and accountable military justice system and consistent with the practice of other prosecution authorities across Canada, I am instructing you to develop, implement and make publicly available prosecution policies in the following areas :

   a. the Canadian Military Prosecution Service's relationship with the Canadian Forces National Investigation Service;

   c. exercise of prosecutorial discretion and post-charge screening;

   d. prosecution of sexual assault cases;

   e. the Canadian Military Prosecution Service's relationship with Canadian Forces authorities;

   f. disclosure of courts martial;

   g. responding to victims' needs;

h. plea, trial and sentence resolution Discussions;

i. Canadian Military Prosecution Service's relationship with Unit Legal Advisers;

j. accountability, independence and consultation;

k. withdrawal of charges;

l. witness interviews; and

m. immunity from prosecution.

3. These policies are to come into effect no later than 31 March 2000.

BGen
JAG
//SIGNED//
Jerry S.T. Pitzul
992-3019/996-8470

DISTRIBUTION LIST

Action

DMP

Information

All Legal Officers

Judge Advocate General

Directive

Directive # : 009/00	Original Date : 23 Mar 00	Update :
Subject : General instructions in respect of defence counsel services	Cross Reference : Section 249.2(2) of NDA	

23 Mar 00

Distribution List

GENERAL INSTRUCTIONS IN RESPECT OF DEFENCE COUNSEL SERVICES

1. This general instruction is issued to the Director of Defence Counsel Services pursuant to my authority under section 249.2(2) of the National Defence Act.

2. In accordance with the requirements of an open, transparent and accountable military justice system, I am instructing you to develop, implement and make publicly available defence policies in the following areas :

   a. DDCS counsel's relationships with clients, including :

      - solicitor/client privilege
      - conflict of interest.

   b. DDCS counsel's relationship with the Canadian Forces chain of command;

   c. professional conduct; and

   d. media relations.

3. These policies are to come into effect no later than 31 March 2000.

BGen
JAG
//SIGNED//
Jerry S.T. Pitzul
992-3019/996-8470

DISTRIBUTION LIST

Action

DDCS

Information

All Legal Officers

Appendix 1

REPORT OF THE DIRECTOR OF DEFENCE COUNSEL SERVICES

Appendix 1

Appendix 1

ANNUAL REPORT OF THE OFFICE OF THE DIRECTOR OF DEFENCE COUNSEL SERVICES

Prepared by Lieutenant-Colonel Denis Couture

Introduction

1. On 1 September 1999, a large number of changes to Canada's military justice system came into effect. One important reform was the formal recognition of an accused person's right to representation. Indeed, the *National Defence Act* (*NDA*) provides at s. 249.17 that "a person who is liable to be charged, dealt with and tried under the Code of Service Discipline has the right to be represented in the circumstances and in the manner prescribed in regulations..."

2. Another important reform was the appointment pursuant to statute of a Director of Defence Counsel Services. Under s. 249.18 (1) of the *NDA*, the Minister may appoint an officer who is a barrister or advocate with at least 10 years standing at the bar of a province to be the Director of Defence Counsel Services. Pursuant to that authority, the Minister appointed Lieutenant-Colonel Denis Couture to be the first Director of Defence Counsel Services (DDCS) for a term of four years commencing 1 September 1999.

3. The DDCS "provides, and supervises and directs the provision of, legal services prescribed in regulations..."in the Canadian Forces [s. 249.19 *NDA*] and does so under the "general supervision of the Judge Advocate General." [s. 249.2 (1) *NDA*].

4. Legal services prescribed by the Governor in Council are found at paragraph 2 of article 101.20 of the *Queen's Regulations and Orders for the Canadian Forces* (*QR&Os*). The same article imposes on the DDCS the duty to report annually to the Judge Advocate General on the provision of the prescribed legal services and the performance of any other duties. [*QR&O* 101.20 (5)].

5. This report pursuant to *QR&O* 101.20 (5) is made, as per the Judge Advocate General's (JAG) request, for the period 1 September 1999 – 31 March 2000 and contains:

   - An overview of DDCS organization;
   - A review of DDCS duties and responsibilities;
   - A review of the relationship between DDCS counsel and the chain of command;
   - Services provided during the reporting period;
   - JAG directive issued under the authority of s. 249.2 (2).

DDCS Organization

6. DDCS consists of the following staff:

   - The Director;
   - Four regular force counsel;
   - Seven reserve force counsel;
   - One legal research analyst;
   - One secretary.

   The present Director holds the rank of Lieutenant-Colonel. Three defence counsel at the rank of Major and one at the rank of Captain complete the regular force component of DDCS. One Lieutenant-Colonel and three Captains form the reserve component of DDCS. It is, however, anticipated that the three remaining reserve positions will be filled, through assignment or recruiting, by the end of the summer 2000. The legal research analyst position is filled on a permanent basis while the secretary is employed on a term basis pending required staffing for a permanent status.

7. Currently, the offices of the regular force component of DDCS are located at 66 Slater Street, Ottawa. In August 2000, DDCS will move to the Asticou Centre in Hull, Québec. Reservists, who are involved in the full-time private practice of law in their own area, are located in Fredericton, Québec City, Ottawa and Edmonton.

Duties and Responsibilities

8. DDCS provides the following principal services:

   Legal Counsel Services:

   - To accused persons:
     - at courts martial [*QR&Os* 101.20 (2) (f)]
     - where there are reasonable grounds to believe that the accused person is unfit to stand trial, at hearings to determine fitness to stand trial [*QR&Os* 101.20 (2) (b)];
     - in cases where a finding of unfit to stand trial has been made, at hearings as to the sufficiency of admissible evidence to put the accused person on trial [*QR&Os* 101.20 (3) (c)];

- To persons sentenced by court martial to detention or imprisonment, at hearings for:
  - release pending appeal [*QR&Os* 101.20 (3) (b)];
  - review of undertakings for release pending appeal [*QR&Os* 101.20 (3) (b) and118.23];
  - cancellation of release pending appeal [*QR&Os* 118.23];
  - to persons held in custody, at hearings by a military judge under ss. 159(1) of the *NDA* to determine retention in custody [*QR&Os* 101.20 (2) (e)].
- To the Respondent (offender), at Court Martial Appeal Court or Supreme Court of Canada hearings where prosecution authorities appeal the legality of a finding or the severity of a sentence awarded by court martial [*QR&Os* 101.20 (2) (g)];
- To a person instituting an appeal or an application for leave to appeal to the Court Martial Appeal Court or the Supreme Court of Canada, with the approval of the Appeal Committee [*QR&Os* 101.20 (2) (h)].

Advisory Services:

- To persons arrested or detained in respect of a service offence pursuant to s. 10(b) of the *Canadian Charter of Rights and Freedoms* (the Charter), on a 7-day-a-week/ 24-hour-a-day basis [*QR&Os* 101.20 (2) (a)];
- To assisting officers and accused persons with respect to the making of an election to be tried by court martial pursuant to *QR&Os* 108.17 and 108.18 [*QR&Os* 101.20 (2) (d)];
- To assisting officers or accused persons on matters of a general nature relating to summary trials [*QR&Os* 101.20 (2) (c)];
- To persons who are the subject of an investigation under the Code of Service *Discipline*, a summary investigation or a board of inquiry [*QR&Os* 101.20 (2) (i)].

Relationship DDCS/Chain of Command

9. Given the nature of the DDCS mandate, it is extremely important that DDCS counsel perform, and be perceived to perform, their duties free from command influences. DDCS lawyers are the "defence bar" of the CF. As such, the DDCS lawyer's solemn duty to his client is to fearlessly raise every issue, advance every argument and ask every question that he thinks will help his client's case.

10. It was in that spirit that the position of DDCS was created in the most recent amendments to the *NDA*. The independence of the DDCS is fostered by the fact that he is appointed by the Minister of National Defence, rather than simply posted to the position by the CF chain of command. Furthermore, DDCS holds office during good behaviour for a term not exceeding four years, and he is eligible for re-appointment on the expiration of a first or subsequent term of office. Nonetheless, DDCS carries out his duties under the "general supervision" of the JAG and receives his administrative support from the latter's staff.

11. With respect to JAG's *general supervision*, it is noteworthy that s. 249.2 (2) of the *NDA* provides that the JAG may issue "general instructions" to DDCS. Unlike the Director of Military Prosecutions [s. 165.17 (3) *NDA*], the DDCS is not subject to instructions or guideline in respect of particular cases.

12. DDCS counsel deal directly with their clients, including assisting officers, irrespective of rank, status, unit or physical location. They also deal with their clients' chain of command, military and civilian prosecution and enforcement authorities, and all other persons involved in disciplinary proceedings respecting their clients. Finally, DDCS counsel interact with military prosecutors, courts martial, the Court Martial Appeal Court, the Federal Court of Canada, the Supreme Court of Canada, provincial bars and professional associations.

Services Provided

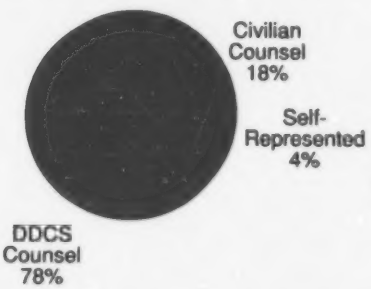
Counsel Services

→ **Courts martial**

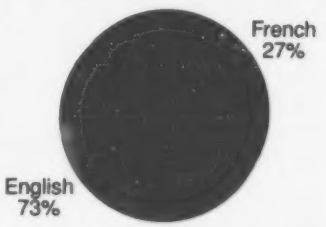
13. When facing a court martial, an accused person has the right to be represented by a DDCS counsel at public expense, may retain legal counsel at his or her own expense or choose not to be represented.

14. During the reporting period, a total of 27 courts martial were completed; two others have commenced, but have been adjourned to the month of April. Representation at courts martial and language of trial have been as shown below.

Representation at Courts Martial



Courts Martial — Language



→ **Appeals**

15. DDCS counsel represented CF members in two appeals during the reporting period. In one case, DDCS counsel acted as counsel for the Respondent, the Minister having initiated the appeal before the Court Martial Appeal Court (CMAC).

16. In the other case, DDCS counsel acted as counsel for the Appellant before the Supreme Court of Canada. That appeal before the Supreme Court of Canada was the last episode of a case where a DDCS counsel had successfully represented the member before a court martial, the court having entered a stay of proceedings by reason of entrapment on the part of the military police. The Minister instituted an appeal from that decision to the CMAC and DDCS counsel represented the member before the CMAC. The CMAC, in a majority decision, granted the appeal. DDCS then initiated an appeal before the Supreme Court of Canada on behalf of the member. The Supreme Court granted the appeal and restored the decision of the court martial.

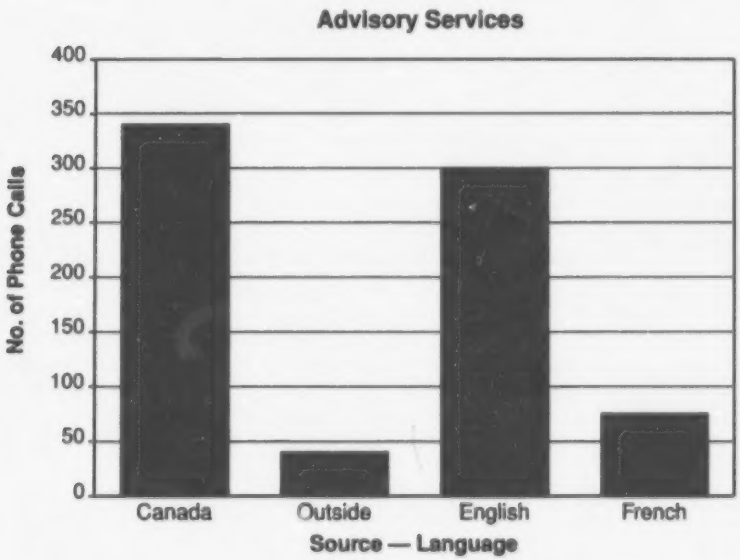
Advisory Services

17. The advisory services provided by DDCS counsel constitute an important aspect of the overall operation of DDCS. Indeed, the situations giving rise to the need for legal advice are numerous and occur on a daily basis. Furthermore, this service contributes largely to the protection of CF members' fundamental rights under the Charter.

18. As indicated at paragraph 8 above, advisory services are available on a 7-day-a- week/ 24-hour-a-day basis. In addition, the service is available in both official languages and accessible by all CF members whether they are posted in Canada or abroad. In order to facilitate the contact with DDCS counsel, two toll-free numbers have been widely disseminated:

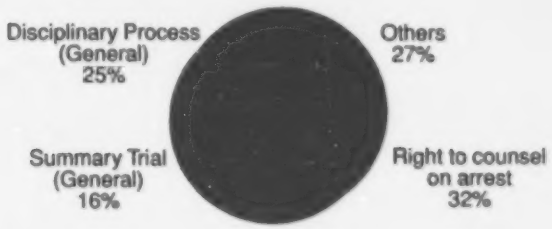
    - ➔ One, relating to the right to seek legal advice upon arrest or detention, to military police and other CF authorities likely to be involved in investigations of a disciplinary or criminal nature;
    - ➔ The other, relating to election between court martial and summary trial and advice on other disciplinary matters, to all CF personnel.

19. During the reporting period, DDCS counsel handled a total of 376 calls. Origin and language of calls are as shown below:



20. The graph below shows the proportion of calls related or not to advice regarding the election of an accused between court martial or summary trial.

The second graph shows the nature of calls that were ***not related*** to the election of an accused between court martial or summary trial.



JAG Directives pursuant to s. 249.2 (2) NDA

21. The JAG, pursuant to s. 249.2(2) of the *NDA*, instructed DDCS to develop, implement and make public defence policies on specified areas, namely:

- ➔ DDCS counsel's relationship with clients;
- ➔ DDCS counsel's relationship with the Canadian Forces chain of command;
- ➔ Professional conduct;
- ➔ Media relations.

It was JAG's direction that these policies were to come into effect no later than 31 Mar 00.

22. In fulfilment of the JAG directive, an advance copy of the *Director of Defence Counsel Services Manual* was issued on 29 March 00. The manual contains information on the military justice system, DDCS operations and directives to DDCS counsel regarding the performance of their duties; directives contained in the manual are binding on DDCS counsel as of the date of publication of the advance copy. Upon completion of the translation, editing and formatting of the manual, it will be made available to JAG and CF authorities as well as to the public on the DDCS web site at the address below:

http://www.dnd.ca/jag/mj_directorate_e.html#top

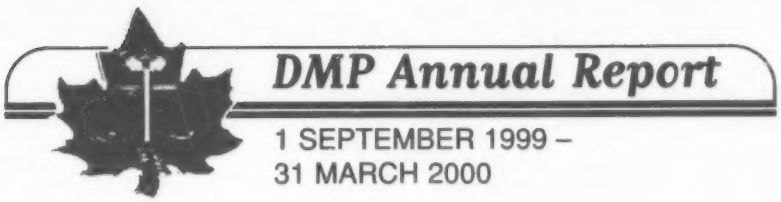
Conclusions

23. It has been my observation over the past seven months that DDCS counsel have discharged their duties in a timely manner with a great deal of enthusiasm and professionalism. This performance along with the institutional changes described above have gone a long way in addressing the credibility issues identified by the *Special Advisory Group on Military Justice and Military Police Investigation* Services led by the late Right Honourable Brian Dickson whose report constituted the blueprint of the recent amendments to the *NDA*.

24. The JAG has played his role as superintendent of the military justice system in the true spirit of the act and provided very good administrative support to DDCS.

Appendix 2

REPORT OF THE DIRECTOR OF
MILITARY PROSECUTIONS



Section 1 — Introduction

Regulatory requirement for an Annual Report

The position of the Director of Military Prosecutions (DMP) was established when the amendments to the *National Defence Act (NDA)* in Section 35 of the Statutes of Canada came into force on 1 September 1999. The Queen's Regulations and Orders (*QR&O*) for the Canadian Forces were also amended effective 1 September 1999 and provide at Volume II, article 110.11 that:

> *"The Director of Military Prosecutions shall report annually to the Judge Advocate General on the execution of his or her duties and functions."*

As the JAG Annual Report covers the reporting period 1 September 1999 to 31 March 2000, I have, as requested, prepared the DMP Annual Report for the same time frame. The JAG Annual Report request is attached as Annex A to this Report.

Historical Context for the Creation of the Office of DMP

In 1997 the Dickson Special Advisory Group on Military Justice and Military Police Investigation Services at recommendation 8 and the Somalia Commission of Inquiry at recommendations 40.19, 40.21 and 40.22, called for an enhanced separation between the prosecution function and the chain of command. The objective was to provide assurance that prosecution and appeal decisions in the military justice system would be made independently and be based on legal principles and criteria. Accordingly, the *NDA* was amended to provide for a separate and independent authority for military prosecutions, the Director of Military Prosecutions.

Canada is not alone in making such changes. In 1997, in the United Kingdom, the British Army and the Royal Air Force also created a military prosecution service. Other allies, such as Australia, are currently considering a review of their military prosecution systems.

Section 2 — The Director of Military Prosecutions and the Canadian Military Prosecution Service

Statutory basis for DMP

The recent amendments to the *NDA*, in sections 165.1 – 165.17, provide for the following:

- ➜ The Minister of National Defence (MND) is authorized to appoint an officer who is a barrister or advocate with at least ten years standing at the bar of a province to be Director of Military Prosecutions (DMP) for a term not exceeding four years;
- ➜ DMP is responsible for the conduct of all prosecutions at courts martial;
- ➜ DMP is authorized to act as counsel for the MND in respect of appeals when instructed to do so;
- ➜ DMP has the exclusive authority and discretion with respect to the preferral of charges for court martial;
- ➜ DMP has the authority to withdraw any charge before the commencement of a trial by court martial, and if a trial by court martial has commenced, DMP may do so with leave of the court martial;
- ➜ DMP, upon the preferral of a charge, has, within regulatory boundaries, the authority to determine the type of court martial that is to try the accused person; and
- ➜ The Judge Advocate General (JAG) has the authority to provide both general and case-specific instructions, in writing, to DMP, who shall make general instructions public and, unless it would not be in the best interests of the administration of military justice, shall make case specific instructions public.

Establishment of Canadian Military Prosecution Service

On 1 September 1999, the prosecutorial function, which had been an integral function of the Office of the JAG, devolved to the DMP and the Canadian Military Prosecution Service (CMPS) was established in its present form. Formerly all legal officers acted as prosecutors; this function is now the sole prerogative of DMP and the CMPS.

CMPS is the collective identifier of the DMP, the Acting Director of Military Prosecutions (A/DMP) and those legal officers appointed to assist and represent the DMP pursuant to section 165.15 of the *NDA*. Its mission is to provide competent, fair, swift and deployable prosecution services in Canada and overseas in support of discipline.

Military discipline has been defined as the prompt obedience to lawful orders whenever, wherever and however given no matter how unpleasant or dangerous the task. Its critical importance has been recognized by Canadian civilian courts:

> *"To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Discipline must be dealt with speedily, and, frequently punished more severely than would be the case if a civilian engaged in such conduct. As a result the military has its own Code of Service Discipline to allow it to meet its particular military needs."*
>
> *Mackay v Rippon [1978] 1 FCTD at 235*

"Recourse to ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military...The existence of a parallel system of military law and tribunals, for the purpose of enforcing discipline in the military is deeply entrenched in our history."

R v Genereux [1992] 1 SCR at 293 and 295

In the performance of this mission, CMPS vision is "Discipline through Justice". CMPS is a key actor in the Canadian military justice system which promotes discipline, good order, high morale, esprit de corps, group cohesion and operational efficiency and capability.

Primary Functions of the CMPS

The primary functions and activities of DMP and the CMPS are all related to JAG's military justice role. They are:

- ➜ Represent the Canadian Forces (CF) at pre-trial custody hearings under the *NDA*;
- ➜ Respond to requests for advice from Canadian Forces National Investigation Service (CFNIS);
- ➜ Review and advise CFNIS on case specific charges;
- ➜ Conduct post charge review of all charges referred for court martial;
- ➜ Prefer charges for trial by court martial;
- ➜ Prepare cases for prosecution before courts martial;
- ➜ Prosecute at courts martial;
- ➜ Represent the CF in applications before other courts relating to specific cases;
- ➜ Represent the CF on appeal before Court Martial Appeal Court (CMAC); and,
- ➜ Assist in representation of the Crown on appeals from CMAC decisions.

Organization of CMPS

The CMPS is organized on a regional basis with a "headquarters" located in Ottawa. The basis for this concept of operations is threefold. First, from a functional perspective, CMPS has direct access to national resources and agencies. Secondly, this provides proximity to the Court Martial Appeal Court of Canada (CMAC), the Supreme Court of Canada (SCC), and the Federal Court of Canada. Thirdly, this mirrors both the organization of the Canadian Forces Legal Branch and the deployment and organization of the CFNIS, the military police agency to whom CMPS provides legal advice.

CMPS is currently established for ten Regular Force legal officer positions, and nine Reserve Force legal officer positions. The Regular Force component is fully staffed; the current strength of Reserve Force members is four. Recruiting is underway to fill the other reserve positions. To date, most reserve positions in the CMPS have been filled by civilian Crown Attorneys. In terms of rank, the establishment calls for one Colonel (DMP); two Commanders; and seventeen Major/Captains. Currently the establishment has nine civilian support staff comprising of two para-legals, five secretaries and two part-time student researchers.

CMPS is geographically distributed as follows:

- DMP is based in Ottawa with four Regular Force and three Reserve Force legal officer positions;
- The Regional Military Prosecutor (RMP) (Central Region) is based in Ottawa with three Regular Force and two Reserve Force legal officer positions;
- The Regional Military Prosecutor (Atlantic) is based in Halifax with one Regular Force and one Reserve Force legal officer position;
- The Regional Military Prosecutor (Eastern Region) is based in Valcartier with one Regular Force and one Reserve Force legal officer position; and,
- The Regional Military Prosecutor (Western Region) is based in Edmonton with one Regular Force and two Reserve Force legal officer positions.

A detailed CMPS Organization Chart is set out at Annex B to this Report.

Section 3 — The Canadian Military Prosecution Service in the Military Justice System

Generally, the role of CMPS within the Canadian military justice system can be categorized as falling under one of the following headings; consultation; the provision of case-specific legal advice; the conduct of prosecutions; and, the conduct of appeals.

The CMPS consultation role usually arises in three contexts. Firstly, CMPS members are consulted by CFNIS members as well as other legal branch colleagues in areas such as identification of offences, requirements for judicial authorizations (such as search warrants and intercepts) or jurisdiction over offences or offenders. Secondly, CMPS is consulted by a number of agencies with respect to military prosecution input to regulatory and statutory developments in the fields of military and general criminal law both within and outside the Canadian Forces. Thirdly, the CMPS has conducted a series of presentations and lectures for CFNIS and MP personnel on subjects such as evidentiary issues, search and seizure, and elements of the offence.

CMPS provides case-specific legal advice to the CFNIS throughout the investigative process. This includes advice on:

- the sufficiency of evidence on pre-investigative assessments
- specific investigative techniques
- authorizations under Part VI of the *Criminal Code of Canada*
- search warrants
- the sufficiency of evidence as it relates to the elements of specific offences
- *Privacy Act* issues
- documentary evidence
- pre-charge screening pursuant to article 107.03 of *QR&O*

The CMPS, through cell phone and pager facilities provides this advice 7 days a week/ 24 hours a day.

The conduct of Prosecutions and of Appeals is dealt with in Sections 4 and 5 below.

Section 4 — Prosecutions

The Prosecution Process

In order to clearly identify the role of the CMPS, the military justice process can be broken down in to seven phases: investigation; pre-charge screening; charging; referral of charges; preferral of charges; trial; and, appeal.

During the investigation phase, an incident takes place, is reported and the appropriate investigative agency commences its action. At this point CMPS may be consulted and/or legal advice may be sought if the investigation is being conducted by the CFNIS. If the investigation is being conducted by local military police or by way of unit investigation, this consultation and advice is provided by the local unit legal advisor (Assistant Judge Advocate General (AJAG) or Deputy Judge Advocate (DJA). CMPS is frequently consulted by AJAGs and DJAs during this phase as a legal resource.

Pre-charge screening is conducted by CMPS only in regard to CFNIS investigated cases. Pre-charge screening consists of a review of the investigatory materials provided by the CFNIS investigator in order to provide a legal opinion as to whether there are reasonable grounds for a person having authority to lay charges to form the belief that an offence has been committed. Generally, a pre-charge screening produces one of three results: an opinion that specific charges are supported by the evidence; an opinion that specific charges are not supported by the evidence; or the matter is returned to the CFNIS with a recommendation for further investigation. The decision on whether or not to lay a charge is that of the CFNIS investigator. In those cases whether another agency has conducted the investigation, such screening is performed by the unit legal advisor.

In the third phase, the charging is done by an authority authorized to lay charges (in the military justice system, the chain of command or a CFNIS member). Where the accused is offered an election as to mode of trial (summary trial or court martial) provision of information is made in a timely manner by unit authorities to that accused so that he or she can make an informed decision. An assisting officer is appointed as a matter of right and the accused is entitled and afforded the opportunity to consult with military legal counsel in order to make such a decision.

If a summary trial is not held and the commanding officer (CO) has decided the matter should proceed further, the referral phase begins. The chain of command, starting with the CO of the accused, initiates a series of procedures to bring the matter forward to DMP. The CO applies to a referral authority for disposal of the charge. A referral authority is defined in *QR&Os* as the Chief of the Defence Staff (CDS) and any officer having the powers of an officer commanding a command (OCC). In his or her application, the CO sets out the reasons for the application, a brief summary of the circumstances surrounding the alleged offence together with a summary of the evidence supporting the charge(s) and any recommendation concerning the disposal of the charge that the CO considers appropriate. In those situations where a CO has made a determination not to proceed, the CFNIS (in regard to charges laid by one of its members) has the independent authority to make such an application to a referral authority. A referral authority must forward an application he or she receives, together with his or her recommendation concerning the disposal of the charge, to DMP. The only situation where a referral authority may not forward an application to the DMP is where the charge was sent forward by the CO solely because he or she felt his or her powers of punishment were inadequate at summary trial and the referral authority, being of the opinion they

were adequate, sends the matter back to the CO for summary trial. It is during this phase that the referral authority, as a representative of the chain of command can identify in writing what he or she believes the service interest to be in a given case. This recommendation is always considered in deciding whether or not to prefer charges.

Upon receipt of the application, DMP must make a decision on preferral of charges. A charge is "preferred" when the charge sheet in respect a charge is drafted and signed by the DMP, or an officer authorized by the DMP to do so and is referred to the Court Martial Administrator (CMA). On receipt of an application from a referral authority, all members of the CMPS have been authorized by DMP to prefer charges in accordance with publicly available DMP Policy Directives. A CMPS prosecutor is assigned the file for a comprehensive legal analysis, called post charge screening, upon which the exercise of prosecutorial discretion is based. Post charge screening is more comprehensive than the pre-charge assessment and includes a consideration of the strength and quality of the evidence. The post charge screening usually includes witness interviews, consultation with subject matter specialists and a review of the documentary evidence. It may also include the drafting or re-drafting of particular charges.

Prosecutors must consider two main issues when deciding whether to proceed with a court martial:

a) firstly, is the evidence sufficient to justify the continuation of charges as laid or the preferral of other charges as disclosed by the evidence? The evidential standard upon which this assessment is based is that there is a sufficiency of admissible evidence on all of the essential elements of the offence(s) such that there exists a reasonable prospect of conviction; and

b) secondly, if there is a sufficiency of evidence, does the public interest (which specifically includes the service interest) require a prosecution to be pursued?

Details regarding the exercise of prosecutorial discretion are set out in DMP Policy Directive 003/00, "Prosecutorial Discretion and Post-Charge Screening" which can, together with all other DMP Policy Directives be found at www.dnd.ca/jag/militaryjustice. A post charge screening has one of four possible results: a charge sheet is prepared, signed and referred to the CMA to have the matter set down for court martial; the charge is referred back for summary trial; further investigation is requested under *QR&O* 110.05; or, the charge is withdrawn. Upon receipt of the signed charge sheet, the CMA convenes the court martial and begins the pre-court martial administration

The sixth phase is trial by court martial. There are four types of courts martial; Standing Court Martial; General Court Martial; Disciplinary Court Martial; and, Special General Court Martial. The type of court martial to be held is determined by regulation, based on the status or rank of the accused and the potential punishment for the offence and, where there is a choice of the type of court martial, this is made by DMP. A court martial is a formal military court, presided over by a legally qualified military judge and has the same powers, rights and privileges as a superior court of criminal jurisdiction with respect to

a) the attendance, swearing and examination of witnesses;

b) the production and inspection of documents;

c) the enforcement of its orders; and

d) all other matters necessary or proper for the due exercise of its jurisdiction, including the power to punish for contempt.

The procedures followed by a court martial are similar to those followed by civilian criminal courts. All prosecutions are conducted by a CMPS legal officer. CF members facing courts martial are entitled to a legally qualified defending officer or, in certain cases, defence counsel free of charge from DDCS. An accused may also retain a civilian lawyer at his or her own expense or where qualifying criteria are met, funded by a provincial legal aid plan.

A chart outlining the prosecution process is attached to this Report as Annex C.

Court Martial Results

Attached at Annex D to this Report, is a summary Part I and statistical analysis Part II of those courts martial commenced and completed during the period 1 September 1999 – 31 March 2000. These statistics do not include two ongoing courts martial that have been commenced within this period but not completed.

The statistical analysis includes a comparison of the rank of those court martialled, the type of court martial, the type of charges and the sentences imposed at court martial. The largest distinct group of charges relate to property offences involving fraud, theft or forgery. As the current system has been in place for only six months, I believe it is premature to draw any firm conclusions from these statistics.

The final phase of the prosecution is the appeal.

Section 5 — Appeals

Appeal Process

The MND may appeal to the CMAC certain decisions by courts martial relating to findings, sentence and termination of proceedings pursuant to s. 230.1 of the *National Defence Act*. Effective 1 September 1999, the MND by order delegated the authority to bring such appeals to DMP. As well, DMP is authorized to respond to any appeals brought by a member against the decision of a court martial. Within the CMPS, two appellate counsel positions (one Regular and one Reserve Force) have been established. They report directly to DMP on all matters relating to appeals. DMP advises MND whenever the authority to appeal is exercised and informs JAG of steps taken in relation to appeals.

The decision to appeal is ultimately exercised by DMP. The DMP Appeals Committee (DAC) was formed to help review and assist in the decision process. The DAC consists of DMP, A/DMP and the two appellate counsel positions. There are two criteria for deciding to appeal. First, is there a reasonable prospect of success on appeal? Second, is it in the interests of the public, including the CF, to bring such an appeal? The DAC considers materials such as the military judge's reasons for his or her decision, the prosecuting officer's recommendation, and the perceived impact of the decision on the military justice system in considering the issue of whether to appeal.

The Federal Department of Justice is involved in co-ordinating any matter that proceeds from the CMAC to the stage of an appeal to the SCC, or the seeking of leave to appeal to that court.

The mechanics of appeal to the CMAC are as set out in the *NDA* and the *Court Martial Appeal Rules*. On filing or receiving service of a Notice of Appeal, counsel is appointed. Under the system in place since 1 September 1999, the CMAC then requests from the CMA copies

of the trial transcripts and exhibits for creation of an appeal book. Thirty days after the receipt of the appeal book the appellant must file and serve a factum, and thirty days after receiving that document the respondent must reply with its own factum. Once the appeal is perfected the matter is set down for hearing. It is DMP policy not to seek extensions of time to take required steps in the appeal process, save in exceptional circumstances, and none has been sought in this reporting period.

Appeal Results

Attached at Annex E to this Report is a chart showing those appeals commenced and completed during the period 1 September 1999 – 31 Mar 2000.

The most identifiable theme to emerge from the various decisions is that the CMAC, while maintaining that, as a matter of law, it can impose a term of incarceration for a first offence involving property, rarely does so. This can be observed in *Deg*, *Levesque*, and *St. Jean*, which followed the CMAC decisions in *Venier*, and *Legaarden*.

The case of *Brown* was an appeal as of right to the SCC by Master Corporal (MCpl) Brown on the issue of entrapment. The SCC upheld the SCM's finding at first instance that MCpl Brown had been impermissibly induced to traffick in a controlled substance, as there had been no reasonable basis to suspect his involvement in that activity in the first place.

Section 6 — DMP Policy, Training and Communications

DMP Policies

In JAG General Instruction 001/DMP/00 dated 21 February 2000, DMP was instructed, in writing, to develop and make publicly available prosecution policies in thirteen areas which were to come into effect no later than 31 March 2000. A copy of this JAG General Instruction to DMP is included as Annex H and can be found in the CMPS section of the JAG Website at www.dnd.ca/jag/militaryjustice. In response to this direction, DMP has promulgated the following policies.

1. Relationship with Canadian Forces National Investigation Service (CFNIS)
2. Pre-Charge Screening
3. Prosecutorial Discretion and Post-Charge Screening
4. Sexual Offences
5. Relationship with Service Authorities
6. Courts martial disclosure
7. Responding to Victims' Needs
8. Plea, Trial and Sentence Resolution Discussions
9. Relationship with Unit Legal Advisors
10. Accountability, Independence and Consultation
11. Withdrawal of Charges
12. Witness Interviews
13. Immunity from Prosecution

DMP Policy Development System

Building on examples of policies obtained from other Canadian civilian prosecution services and utilizing the experience, policy analysis and drafting expertise of Mr. Brad Allison, a senior prosecutor with the Federal Prosecution Service, these core policies were developed. They were designed to reflect current Canadian prosecution practice while at the same time adapting that practice to the unique demands of a military justice system. In addition to providing direction to military prosecutors, these publicly available policies are also designed to enhance public understanding of how the military prosecution system works.

Prosecution Training

One of DMP's goals for 1999-2000 was to increase the professional capabilities of prosecutors through professional training with other civilian prosecutors, and through opportunities to obtain experience working in other jurisdictions through the establishment of a formal training programme for prosecutors. Prosecution training was initiated before the formal establishment of the CMPS on 1 Sep 99, in anticipation of a continuous tempo of prosecutions and has been extended to those legal officers who have been nominated for CMPS postings in 2000. A list of courses taken by military prosecutors from 1 April 1999 to 31 March 2000 is found at Annex F. In addition to those courses set out below, DMP conducted a Prosecution Workshop during the week immediately preceding the formal establishment of CMPS, 29 August to 2 September 1999. A copy of the schedule for that workshop is attached as Annex G.

As part of extra-jurisdictional training, and in anticipation of CMPS' establishment, a military prosecutor was seconded to the Federal Department of Justice in Yellowknife during the period May to July 1999 to obtain prosecution experience within that jurisdiction.

As legal officers, the prosecutors of the CMPS also retain their military skills, so that they can meet the deployment capability set out in the CMPS Mission Statement.

CMPS Communications

In April 1999, the office of JAG opened its Website on the Internal Defence Information Network (DIN) and the DNET on the Internet. In September 1999, as part of the second phase of this project, CMPS opened its own portion of the Website as part of its communications strategy and to facilitate openness and transparency in the military justice system.

The CMPS Website provides DMP a mechanism to make publicly available court martial and appeal results together with JAG General Guidelines and Instructions, JAG Case Specific Instructions and DMP Policy Directives. The CMPS Website, located in the Military Justice portion of the JAG Website, currently includes the following subjects:

- Background to DMP
- Role
- Vision
- Mission
- Working Relationships
- Primary Functions
- DMP Policy Directives
- JAG General Instructions

The website address is www.dnd.ca/jag/militaryjustice.

In order to enhance both the professionalism of military prosecutors and to increase the awareness of the military justice system amongst its civilian counterparts, the DMP was invited to join the Federal/Provincial/Territorial Heads of Prosecution Committee whose membership includes the heads of all civilian prosecution systems in Canada. In addition, the CMPS has become an institutional member of the International Association of Prosecutors, an organization dedicated to improving the standards of prosecution services across the world.

Section 7 — Relationships

Relationship with the Office of the Judge Advocate General

It is the MND who has the sole and exclusive power to appoint or remove the DMP (although the latter only for cause and after an Inquiry Committee has looked into any allegations of misconduct and made a recommendation to the MND). The appointment is for a fixed term of four years.

The DMP relationship with JAG is set out in statute. The JAG, pursuant to s.9.2 of the *NDA* has general responsibility for superintendence of the administration of military justice. This responsibility, combined with governmental and departmental policies and directives means the JAG is responsible to ensure personnel and fiscal resources are provided to the DMP to permit the completion of the DMPs assigned duties under the *NDA*. The JAG's relationship with DMP is set out at s.165.17 of the *NDA*. Under that provision the DMP acts "under the general supervision of the JAG". Such general supervision means that the JAG does not — except as set out in regulations — become involved in individual cases, nor does he or she deal directly with individual members of the CMPS in regard to their prosecutorial functions. The JAG's relationship with the CMPS is through the DMP. It is clear in s.165.1 of the *NDA* that the DMP derives power to prefer or withdraw charges and to conduct prosecutions directly from the statute. That power is exercised independently of the JAG subject to statutory directions.

The JAG's role in military prosecutions, as set out in the *NDA*, is open and transparent. The JAG may issue in writing general instructions or guidelines in respect of prosecutions to DMP. The DMP is required to ensure that these directions are available to the public. This is being done through posting any such directions on the CMPS section of the JAG website. The JAG may also issue instructions or guidelines in writing to DMP in respect of a particular prosecution. In such cases, unless in accordance with the provisions of the *NDA* the DMP considers it would not be in the best interests of the administration of military justice, these instructions and guidelines must also be made public. None have yet been issued, but the same mechanisms will be utilized to make them public.

Relationship with the Chain of Command

Where an alleged offence is dealt with by court martial, all matters of prosecutorial discretion are in the hands of CMPS. The chain of command, and in particular unit and formation commanders, have legitimate interests in the manner in which a case is handled. These officers bear a direct responsibility for the operational readiness and efficiency of the CF; the safety of their base, unit or elements; and the welfare, efficiency and good discipline of all their subordinates. The fair, swift and effective prosecution of offences has a direct and positive effect upon morale and discipline within a unit. The chain of command is a key stake holder on the military justice system.

Given the institutional independence of DMP and CMPS, the *NDA* and *QR&O* define specific avenues whereby the service interest in a particular case as defined by the chain of command can be expressed to and considered by prosecutors. These avenues are explained in Section 4 of this Report. To supplement these, DMP has issued Policy Directive 005/00 "Relationship with Service Authorities" to provide direction and guidance to CMPS.

Relationship with the Court Martial Administrator

The Court Martial Administrator is now responsible for the scheduling and administration of courts martial. This has the potential to significantly streamline the court martial process.

The Deputy Director of Military Prosecutions (DDMP) is the main point of contact for the Court Martial Administrator within CMPS. Prosecution requests for court martial dates are co-ordinated by the DDMP. Prosecutors in requesting dates speak to defence counsel to try and establish a mutually suitable date to deal with a case in a timely fashion. If no mutually suitable date can be found, then the prosecution requests the earliest date it is available to proceed. In either situation, it is the Court Martial Administrator who ultimately establishes the date a court martial is set down.

The Court Martial Administrator is also responsible to deal directly with unit authorities to organize suitable courtroom facilities and support. DMP, however, establishes where, geographically,a court martial is to be held. The guiding principles are that wherever possible it should be where the offence occurred and in a location that is easily accessible to the military community. This will normally be a fixed military court room or other on-base location.

The practice of the CMPS is to subpoena its witness at courts martial. The requests for subpoenas are sent to the Court Martial Administrator.

Relationship with the Canadian Forces National Investigation Service

CFNIS is the lead investigative agency to whom CMPS provides legal advice and with whom CMPS interacts on a day-to-day basis. Although entirely distinct, as one is a police agency and the other a prosecution service, the relationship with CFNIS is based on professionalism, mutual respect and courtesy. This relationship has been formalized from the prosecution perspective by the issuance of DMP Policy Directive 001/00, " Relationship with the Canadian Forces National Investigation Service". This policy emphasizes the respective independence of the two services. CMPS prosecutors cannot direct a member of the CFNIS to start an investigation or to lay charges. The CFNIS opens and conducts investigations and determines the structure, scope, length and the means to carry out investigations. Before the charge is laid the roles of the prosecutor are consultative and advisory in nature. The decision to lay a charge is completely within the duty and discretion of the CFNIS.

It is, however the right and duty of the DMP through the individual prosecutors to supervise military prosecutions once charges are referred. This is a fundamental part of the military justice system. On request, pursuant to *QR&O* article 110.05, the CFNIS (and other investigative bodies) have a duty to carry out further investigations that the prosecutor believes are necessary to present the case fairly and effectively in court.

The relationship is best summarized as follows: in matters primarily related to investigation, the CFNIS is the decision making authority and CMPS provides advice; in matters primarily related to prosecution, CMPS is the decision making authority and the CFNIS provides assistance.

Section 8 — Jag Instructions and Guidelines

JAG General Instructions and Guidelines

As mentioned in section 7 above, s.165.17(2) of the *NDA* authorizes the JAG to issue general instructions or guidelines in writing in respect of prosecution and directs that the DMP shall ensure they are available to the public. To date one such general instruction "JAG General Instruction 001/DMP/00" has been issued. It can be found on the JAG Website at www.dnd.ca/jag and is annexed hereto as Annex H.

JAG Case Specific Instructions or Guidelines

No case specific instructions or guidelines have been issued to the DMP by JAG pursuant to s.165.17(3) of the *NDA.*

Section 9 — Director's Comments

The first six months of the CMPS has been a busy and interesting time. In 1999 DMP established three main goals: to develop effective, clear publicly available policies which amplify the prosecution process set out in Bill C-25 and explain when, how and by whom discretionary decisions will be made; to improve the swiftness of the prosecution process by establishing priorities and improving administrative processes; and to increase the professional capabilities of prosecutors through training and opportunities to obtain experience by working in other jurisdictions. All those goals, I believe, are currently being achieved.

It has been most important in the first six months to establish new relationships and processes which assist in making the statutory and regulatory framework function effectively. In the next year, as the system matures, I anticipate an increase in the demand for CMPS services in all the major service areas: consultative; case specific advice; prosecutions and appeals. This increase may lead to a requirement to review, reallocate or augment personnel resource allocations and review and improve case management practices to continue to meet the goals established for the CMPS. In particular, we have already found it is a significant challenge for an office staffed with only one Regular Force lawyer to provide effective advisory services and court martial preparation while simultaneously engaged in a prosecution in a different geographic location. This has already led to a higher than anticipated temporary duty status for CMPS personnel.

The three areas which the CMPS has identified as most important in service delivery in 2000 is the fairness of prosecutions, the swiftness of prosecutions and the education of the military public about the court martial process.

DMPs three primary goals for 2000-2001 are to fully staff the Reserve Force positions in CMPS and to effectively integrate them into CMPS operations; to identify suitable candidates for military prosecution positions and initiate a comprehensive introductory training programme; and, to increase the understanding of the military justice system within local, national and international prosecution organizations.

Annex A

MEMORANDUM

1000-4-2 (SA(3)/JAG)
24 Feb 00
Dist List

Jag Annual Report

1. As you are aware the first JAG Annual Report on the administration of military justice will cover the reporting period of 1 Sep 99 to 31 Mar 00.
2. Consequently, I request that each of you prepare a report, in bilingual format, covering the activities of your respective offices. Your reports will be included as appendices in the JAG Annual Report. I further request that you submit your reports to DLaw/MJ P & R no later than 3 Apr 00.

Jerry S.T. Pitzul
BGen
JAG
996-8470/992-3019

Dist List

Action

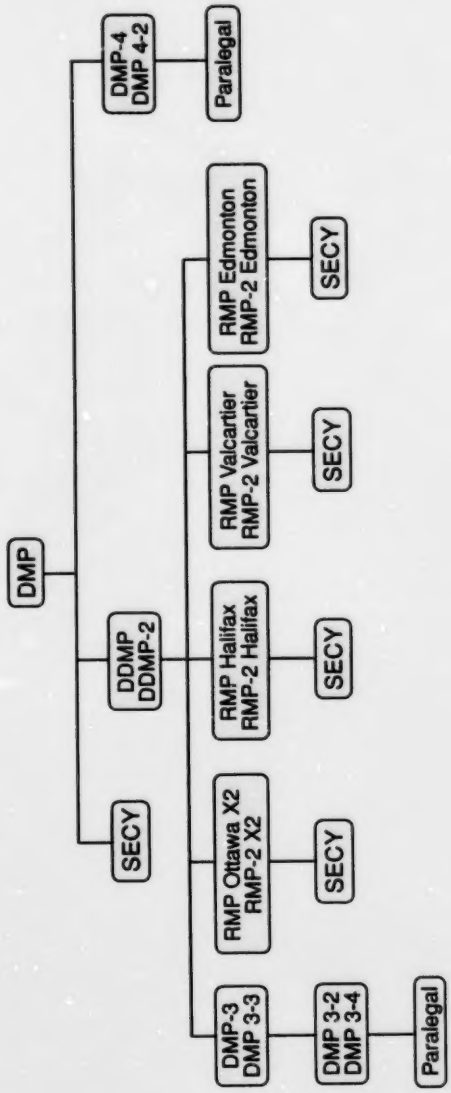
DMP
DDCS

Info

DLaw/MJ P & R

Annex B

CANADIAN MILITARY PROSECUTION SERVICE ORGANIZATION CHART



Annex C

PROSECUTION PROCESS

Serial	Action	Reference	Comment
1.	Incident & report	QR&O 1.02 QR&O 4.02(e) QR&O 5.01(e) QR&O 19.01 QR&O 19.015	Service offence defined Responsibility to Report — Officers Responsibility to Report — NCMs Enforcement of Regulations Lawful Commands and Orders
2.	Investigation	QR&O Chapter 106 MP Policy Chap 9 DMP Policy 001/00	Investigation of Service Offences. Investigation: General Relationship with Canadian Forces National Investigation Service (CFNIS)
3.	Charges laid	QR&O 107.015 QR&O 107.02 QR&O 107.03 DMP Policy 002/00	Meaning of "Charge" Authority to Lay Charges Pre-Charge Screening by Legal Officer Pre-Charge Screening
4.	CO Disposition of Charge and Referral Authority Action	QR&O 107.11 QR&O 107.12 QR&O Chap 108 QR&O Chap 109 QR&O Chap 109.05	Requirement to Obtain Legal Advice Decision not to proceed — Charges laid by NIS. Summary Proceedings Application to Referral Authority for Disposal of a charge. Application forwarded to DMP.
5.	Preferral Action	NDA s.165 NDA s.165.12(1) NDA s.165.12(2) QR&O Chap. 110 DMP Policy 003/00	Charge must be preferred. DMP authority to prefer charges DMP authority to withdraw charges. Action by DMP in respect of charges. Prosecutorial Discretion and Post-Charge Screening
6.	Court Martial	QR&O Chap. 111 QR&O Chap. 112 QR&O Chap. 119 DMP Policy 006/00 DMP Policy 007/00 DMP Policy 008/00	Convening of Courts Martial and Pre-Trial Administration Procedure at Courts Martial Mental Disorder Courts Martial Disclosure Responding to Victims' Needs Plea, Trial and Sentence Resolution Discussions
7.	Appeal to CMAC and SCC	NDA ss. 234-244 QR&O Chap. 115 QR&O Chap. 118 NDA s.245	Court Martial Appeal Court of Canada Appeals from Courts Martial. Release Pending Appeal. Appeal to Supreme Court of Canada

Annex D (Part I)

COURT MARTIAL STATISTICS
01 SEP 99 – 31 MAR 00 (COMMENCED AND COMPLETED)

Pers	Rank	Offences		Description	Dispositions	Sentence	Geographic Location of CM	Geographic Location of Offence	Command	Language of Trial
1	SCM	NCO	s. 117(f) NDA s. 117(f) NDA s. 117(f) NDA s. 117(f) NDA s. 117(f) NDA s. 139(2) CCC	An Act of a Fraudulent Nature An Act of a Fraudulent Nature An Act of a Fraudulent Nature An Act of a Fraudulent Nature An Act of a Fraudulent Nature Obstructing Justice	Guilty Guilty Guilty Guilty Guilty Withdrawn	Fine of $1200	Halifax, Nova Scotia	Halifax, Nova Scotia	CAS	English
2	SCM	NCO	s. 334 CCC s. 351 CCC s. 348(1)(B) CCC s. 334 CCC s. 348(1)(B) CCC s. 334 CCC) s. 348(1)(B) CCC s. 334 CCC s. 348(1)(B) CCC s. 334 CCC s. 348(1)(B) CCC s. 334 CCC	Theft Possessing a break-in instrument Breaking and Entering Theft Breaking and Entering Theft Breaking and Entering Theft Breaking and Entering Theft Breaking and Entering Theft	Guilty Withdrawn Withdrawn Guilty Withdrawn Guilty Withdrawn Guilty Withdrawn Guilty Withdrawn Guilty	Severe Reprimand Fine of $5000	Halifax, Nova Scotia	Halifax, Nova Scotia	CAS	English
3	SCM	NCO	s. 95 NDA s. 266 CCC	Abuse of a Subordinate Assault	Stayed Stayed	N/A	Hull, Quebec	Ottawa, Ontario	NDHQ	French
4	SCM	NCO	s. 380(1)(B) CCC s. 367 CCC s. 367 CCC	Fraud Forgery Forgery	Not Guilty Guilty Guilty	Reprimand Fine of $800	Valcartier, Quebec	Quebec City, Quebec	CAS	French

COURT MARTIAL STATISTICS
01 SEP 99 – 31 MAR 00 (COMMENCED AND COMPLETED)
(continued)

Type	Rank	Offences		Description	Dispositions	Sentence	Geographic Location of CM	Geographic Location of Offence	Command	Language of Trial
5	SCM	NCM	s. 84 NDA s. 267(B) CCC s. 97 NDA	Striking a Superior Officer Assault Causing Bodily Harm Drunkenness	Not Guilty Not Guilty Guilty	Reprimand Fine of $1000	Edmonton, Alberta	Edmonton, Alberta	CLS	English
6	SCM	NCO	s. 114 NDA s. 116 NDA s. 114 NDA s. 116 NDA s. 124 NDA s. 125(a) NDA	Stealing Sold Improperly Forces Property Stealing Sold Improperly Forces Property Negligent Performance of Duty Wilfully Made False Statement	Guilty Not Guilty Not Guilty Not Guilty Not Guilty Guilty	$2000 Fine Reduction in Rank to Cpl	Borden, Ontario	Borden, Ontario	CLS	English
7	SCM	NCO	s. 129 NDA	An Act to the Prejudice	Guilty Fine	$1000	Gagetown, New Brunswick	Halifax, Nova Scotia	CLS	English
8	SCM	NCM	s. 266 CCC s. 83 NDA s. 111 NDA	Assault Disobeyed a Lawful Command Drove a CF Vehicle in a Dangerous Manner	Guilty Guilty Guilty	30 days detention	Gagetown, New Brunswick	Gagetown, New Brunswick	CLS	English
9	SCM	NCO	s. 271 CCC	Sexual Assault	Not Guilty	N/A	Velika Kladusa, Bosnia	Velika Kladusa, Bosnia	CAS	English
10	SCM	NCM	s. 354(1) (a)CCC	Possession of Property by Crime	Stayed	N/A/	Petawawa, Ontario	Petawawa, Ontario	CLS	English
11	SCM	Officer	s. 97 NDA	Drunkenness	Guilty $1500 Fine	Reprimand	FYR of Macedonia and Hull, Quebec	Kosovo	DCDS	English
12	SCM	NCM	s. 129 NDA s. 97 NDA	Conduct to the Prejudice Drunkenness	Not Guilty Not Guilty	N/A	Halifax, Nova Scotia	Halifax, Nova Scotia	CMS	English
13	SCM	NCM	s. 90 NDA	Absent Without Leave	Guilty	$350 Fine	Borden, Ontario	Borden, Ontario	CFRETS	English

COURT MARTIAL STATISTICS
01 SEP 99 – 31 MAR 00 (COMMENCED AND COMPLETED)
(continued)

Type	Rank	Offences	Description	Dispositions	Sentence	Geographic Location of CM	Geographic Location of Offence	Command	Language of Trial
14	SCM	NCM s. 114 NDA s. 91(1) CCC s. 89 CCC	Stealing Possessing a Restricted Weapon Carrying a Concealed Weapon	Stayed Stayed Stayed	N/A	Owen Sound, Ontario	Owen Sound Ontario	CLS	English
15	SCM	Officer s. 266 CCC s. 95 NDA	Assault Striking a Subordinate	Not Guilty Not Guilty	N/A	Esquimalt, British Columbia	Esquimalt, British Columbia	Other NORAD	English
16	SCM	NCO s. 114 NDA s. 117(f) NDA s. 114 NDA s. 129 NDA s. 367 CCC s. 368 CCC s. 367 CCC s. 368 CCC s. 380(1) CCC	Stealing When Entrusted An Act of a Fraudulent Nature Stealing When Entrusted Conduct to the Prejudice Forgery Uttering a Forged Document Forgery Uttering a Forged Document Fraud	Stayed Stayed Stayed Stayed Stayed Stayed Stayed Stayed Stayed	N/A	St-Jean, Quebec	St-Jean, Quebec	CLS	French
17	SCM	NCM s. 334 CCC s. 354 CCC s. 82(1) CCC s. 78(1) CCC	Theft Possession of Property by Crime Possession of Explosive Taking an Explosive on Civil Aircraft	Not Guilty Guilty Not Guilty Not Guilty	$3000 Fine 3 mths imprisonment (suspended)	Calgary, Alberta Columbia	Comox, British	CLS	English
18	SCM	NCO s. 380(1) CCC s. 380(1) CCC s. 380(1) CCC s. 380(1) CCC	Fraud Fraud Fraud Fraud	Withdrawn Withdrawn Guilty Guilty	90 days detention	Geilenkirchen Germany	Brussels, Belgium	DCDS	English
19	SCM	NCM s. 267(b) CCC s. 267(a) CCC s. 86 NDA s. 97 NDA	Assault Causing Bodily Harm Assault With a Weapon Quarrelling Drunkenness	Guilty Guilty Guilty Guilty	$3000 Fine 90 days detention (suspended)	Comox, British Columbia	Comox, British Columbia	CAS	English

COURT MARTIAL STATISTICS
01 SEP 99 – 31 MAR 00 (COMMENCED AND COMPLETED)
(continued)

Type	Rank	Offences	Description	Dispositions	Sentence	Geographic Location of CM	Geographic Location of Offence	Command	Language of Trial
20	SCM	Officer s. 129 NDA	Neglect to the Prejudice	Guilty Reprimand	$750 Fine Ontario	Toronto, Ontario	Borden,	CLS	English
21	SCM	NCO s. 114 NDA s. 129 NDA s. 114 NDA s. 129 NDA	Stealing An Act to the Prejudice Stealing An Act to the Prejudice	Guilty Not Guilty Not Guilty Not Guilty	$1000 Fine Severe Reprimand	Saint-Jean, Quebec	Montreal, Quebec	CLS	English
22	SCM	NCM s. 5(1) CDSA s. 5(1) CDSA s. 5(1) CDSA s. 5(1) CDSA s. 4(1) CDSA s. 465(1) (c) CCC	Trafficking Trafficking Trafficking Trafficking Possession Conspiracy to Commit an Indictable Offence	Not Guilty Not Guilty Not Guilty Not Guilty Guilty Not Guilty	$350 Fine	Halifax, Nova Scotia	Halifax, Nova Scotia	CMS	English
23	SCM	NCM s. 367 CCC s. 368 CCC s 380(1) CCC s. 367 CCC s. 368 CCC s. 380(1) CCC s. 380(1) CCC s. 380(1) CCC s. 380(1) CCC	Forgery Uttering a Forged Document Fraud	Guilty Withdrawn Guilty Guilty Withdrawn Guilty Guilty Guilty Guilty Guilty	60 days Imprisonment (suspended) $5000 Fine	Halifax, Nova Scotia	Halifax, Nova Scotia	CMS	English
24	SCM	NCM s. 173(1) CCC s. 129 NDA	Indecent Exposure Conduct to the Prejudice	Not Guilty Guilty	$500 Fine Severe Rep.	Valcartier, Quebec	Velika Kladusa, Bosnia	DCDS	French

COURT MARTIAL STATISTICS
01 SEP 99 – 31 MAR 00 (COMMENCED AND COMPLETED)
(continued)

Type	Rank	Offences	Description	Dispositions	Sentence	Geographic Location of CM	Geographic Location of Offence	Command	Language of Trial
25	SCM	NCM	s. 5(1) CDSA s. 5(1) CDSA s. 5(1) CDSA	Guilty Guilty Guilty	2 months imprisonment	Valcartier, Quebec	Quebec, Quebec	CLS	French
26	SCM	NCM	s. 117(f) NDA s. 117(f) NDA s. 117(f) NDA s. 125(a) NDA s. 117(f) NDA s. 125(a) NDA	An Act of a Fraudulent Nature An Act of a Fraudulent Nature An Act of a Fraudulent Nature Wilfully Made a False Entry An Act of a Fraudulent Nature Wilfully Made a False Entry	Guilty Guilty Guilty Not Guilty Guilty Not Guilty	$1000 Fine Severe Reprimand Reduction in Rank to Pte	Halifax, Nova Scotia	Halifax, Nova Scotia	CMS	English
27	SCM	Officer	s. 129 NDA s. 114 NDA c. 129 NDA	An Act to the Prejudice Stealing An Act to the Prejudice	Guilty Stayed Guilty	$1500 Fine Reprimand	Saint-Jean, Quebec	Montreal, Quebec	CLS	French

(Two Court Martials were commenced in this time frame but not completed)

COURT MARTIAL STATISTICAL SUMMARY
01 SEP 99 – 31 MAR 00 (COMMENCED AND COMPLETED)

1. Type of Court Martial:

Type of Court Martial	Number of Cases
SCM	27
DCM	0
GCM	0
SGCM	0
TOTAL	**27**

2. Rank Of Accused Person:

Rank	Number of Cases
NCM	13
NCO	10
Officer	4
Other	0
TOTAL	**27**

3. Offences:

Offences	Description	Number of Offences
s. 83 NDA	Disobeying a Lawful Command	1
s. 84 NDA	Striking a Superior Officer	1
s. 86 NDA	Quarrelling with a Person Subject to CSD	1
s. 90 NDA	Absent Without Leave	1
s. 95 NDA	Abuse of Subordinates	2
s. 97 NDA	Drunkenness	4
s. 111 NDA	Drove a CF vehicle in a dangerous manner	1
s. 114 NDA	Stealing When Entrusted	8
s. 116 NDA	Sold Improperly Property of Forces	2
s. 117(f) NDA	An Act of a Fraudulent Nature	11
s. 124 NDA	Negligent Performance of Military Duty	1
s. 125(a) NDA	Willfully Made a False Entry	3
s. 129 NDA	An Act to the Prejudice	5

Offences	Description	Number of Offences
s. 129 NDA	Conduct to the Prejudice	3
s. 129 NDA	Neglect to the Prejudice	1
s. 130 NDA (4(1) CDSA)	Possession	1
s. 130 NDA (5(1) CDSA)	Trafficking	7
s. 130 NDA (78(1) CCC)	Taking an Explosive on a Civil Aircraft	1
s. 130 NDA (82(1) CCC)	Possession of an Explosive	1
s. 130 NDA (89 CCC)	Carrying a Concealed Weapon	1
s. 130 NDA (91(1)(c) CCC)	Possession of a Restricted Weapon	1
s. 130 NDA (139(2) CCC)	Obstructing Justice	1
s. 130 NDA (173(1) CCC)	Indecent Exposure	1
s. 130 NDA (266 CCC)	Assault	3
s. 130 NDA (267(a) CCC)	Assault with a Weapon	1
s. 130 NDA (267(b) CCC)	Assault Causing Bodily Harm	2
s. 130 NDA (271 CCC)	Sexual Assault	1
s. 130 NDA (334 CCC)	Theft	7
s. 130 NDA (348(1)(B) CC)	Breaking and Entering	5
s. 130 NDA (351 CCC)	Possession of a Break-in Instrument	1
s. 130 NDA (354(1)(a) CCC)	Possession of Property Obtained by Crime	2
s. 130 NDA (367 CCC)	Forgery	6
s. 130 NDA (368 CCC)	Uttering a Forged Document	4
s. 130 NDA (380(1)(B) CCC)	Fraud	12
s. 130 NDA (465(1)(c) CCC)	Conspiring to Commit Indictable Offence	1
TOTAL OFFENCES		**105**

4.(a) Dispositions:

Disposition	Number of Charges
Guilty	52
Not Guilty	26
Stayed	16
Withdrawn	11
TOTAL	**105**

(11 charges were laid in the alternate)

4. (b) Disposition by Case:

Disposition	Number of Cases
Guilty	20
Not Guilty	7
TOTAL	**27**

5. (a) Punishment Type:
(Note: More than one type of punishment can be included in a sentence)

Punishment Type	Number of Cases
Reprimand	5
Severe Reprimand	4
Fine:	17
Detention	3
Imprisonment	3
Reduction in Rank	2
TOTAL	**34**

(b) Fines:

Amount	Number of Cases
$500 and Under	3
$1000 and Under	6
$2000 and Under	4
$3000 and Under	2
$5000 and Over	2
TOTAL	**17**

(No fines were imposed between $3000 and $5000.)

6. Geographic Location of Court Martial:

Location	Number of Cases
Edmonton, Alberta	1
Halifax, Nova Scotia	6
National Capital Region	1
Borden, Ontario	2
Gagetown, New Brunswick	2
Velika Kladusa, Bosnia	1
Petawawa, Ontario	1
Skopje, FYR of Macedonia	1
Owen Sound, Ontario	1
Esquimalt, British Columbia	1
Geilenkirchen, Germany	1
Comox, British Columbia	1
St-Jean, Quebec	3
Toronto, Ontario	1
Valcartier, Québec	3
Calgary, Alberta	1
TOTAL	**27**

7. **Geographic Location of Offence**

Location	Number of Cases
Ottawa, Ontario	1
Borden, Ontario	3
Petawawa, Ontario	1
Owen Sound, Ontario	1
Quebec City, Quebec	2
St-Jean, Quebec	1
Montreal, Quebec	2
Halifax, Nova Scotia	7
Gagetown, New Brunswick	1
Edmonton, Alberta	1
Esquimalt, British Columbia	1
Comox, British Columbia	2
Velika Kladusa, Bosnia	2
Kosovo	1
Brussels, Belgium	1
TOTAL	**27**

7. **Command:**

Command	Number of Cases
Cfrets	1
DCDS	3
CLS	12
CAS	5
CMS	4
NDHQ	1
OTHER	1
TOTAL	**27**

8. **Language of Trial:**

Language of Trial	Number of Cases
English	21
French	6
Bilingual	0
TOTAL	**27**

Annex E

APPEALS HEARD FROM 1 SEP 99 – 31 MAR 00

CMAC #	Appellant	Respondent	Nature of Offence	Type of Appeal	Hearing Date and Place	Judgement
426	Pte Brooks	Her Majesty the Queen	Sexual Assault	Legality of Findings Legality of Sentence	17 Sep 99 Edmonton	On 16 Dec 99 the CMAC ordered the conviction quashed and an acquittal entered.
427	Lt(N) Dag	Her Majesty the Queen	Stealing while Entrusted ($1307.90)	Severity of Sentence	26 Oct 99 Ottawa	The CMAC reduced the sentence at SCM from four months imprisonment to a severe reprimand and a fine of $5,000.00
428	Her Majesty the Queen	MCpl Leveque	Attempted Fraud ($35,615.42)	Severity of Sentence	29 Nov 99 Ottawa	The CMAC upheld the sentence at SCM of a Severe Reprimand and $4000.00 fine
429	Pte St. Jean	Her Majesty the Queen	Fraud ($30,835.05)	Legality and Severity of Sentence	21 Jan 00 Ottawa	On 8 Feb 00 the CMAC set aside the sentence of four months imprisonment and substituted a reduction in rank to Corporal and a fine of $8,000.00
SCC 26990	MCpl Brown	Her Majesty the Queen	Trafficking in a Controlled Substance	Appeal to SCC of CMAC decision overturning SCM	15 Oct 99 Ottawa	The SCC overturned the decision of CMAC and allowed to stand the SCM's finding of entrapment.

Annex F

PROFESSIONAL DEVELOPMENT OF MILITARY PROSECUTORS

Host Organization	Name of Course	Number of Attendees
Ontario Crown Attorney Summer School	Wiretap Homicide Sexual Assault Search and Seizure Expert Evidence Current Legal Issues	1 1 1 1 1 1
Attorney General of Ontario	Crown Attorney Educational Seminar 2000	2
Federation of Law Societies of Canada	The National Criminal Law Programme	3
Federal Department of Justice	Crown Prosecutors' Course	2
Barreau du Quebec	Techniques des Plaidoire	1
Attorney General of Ontario	Wiretap Agents Course	1
Law Society of Upper Canada	DNA Forensic Evidence	1
Law Society of Upper Canada	Criminal Cross Examination	1
Ontario Centre for Advocacy Training	Appellate Advocacy Course	1
Office of the Judge Advocate General	Presiding Officer Training	11

Annex G

MILITARY PROSECUTORS' WORKSHOP
NAVCAN CORNWALL
29 AUG – 2 SEP 99

Day / Time	Activity	Discussion Leaders
Sunday, 29 Aug 99		
1300	Bus departs Les Suites Hotel, Ottawa	
1600-1730	Workshop Overview and Objectives	Col Carter
1900-2030	Incidents and Investigations (Relationship with NIS, Search Warrants, DNA, Surveillance, Sexual Offences)	Cdr Price, LCol Young
Monday, 30 Aug 99		
0800-0900	Pre-trial Custody	Col Carter
0900-1000	Charging (Police Reports, Pre-charge Screening and Disclosure)	Cdr Price
1000-1015	*Coffee*	
1015-1200	Ethics	A. Berzins
1200-1315	*Lunch*	
1315-1455	Proceeds of Crime and Mens Rea	A. Morin
1445-1500	*Coffee*	
1500-1600	The Referral Process	Col Carter
1930	Meet and Greet at the "Banquet Room"	
Tuesday, 31 Aug 99		
0800-0900	Post Charge Screening and Exercise of Prosecutorial Discretion	Col Carter
0900-1000	The Preferral Process	Cdr Price
1000-1015	*Coffee*	
1015-1100	Post Trial Issues (Procedural and Substantive)	Cdr Price
1100-1200	Role and Operations of DDCS	LCol Couture
1200-1315	*Lunch*	
1315-1445	Appeals	Maj Rippon
1445-1500	*Coffee*	
1500-1630	Performance Assessment/Business Plan	Col Carter, Maj Perron

MILITARY PROSECUTORS' WORKSHOP
NAVCAN CORNWALL
29 AUG – 2 SEP 99
(continued)

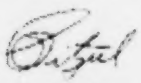
Day / Time	Activity	Discussion Leaders
Wednesday, 1 Sep 99		
0800-1000	Policies, Practice Notes and Handbooks	Col Carter, Cdr Price
1000-1015	*Coffee*	
1015-1100	View from the Provost Marshal's Office	LCol Dickson
1100-1200	Hearsay	T. Buziak
1200-1315	*Lunch*	
1315-1455	Recapitulation (The Prosecution File)	Col Carter, Cdr Price, Capt Koppang
1445-1500	*Coffee*	
1500-1545	Recapitulation (continued)	Col Carter, Cdr Price, Capt Koppang
1545-1700	JAG Address	BGen Pitzul
1900	*Workshop BBQ Dinner — "Banquet Room"*	
Thursday, 2 Sep 99		
0900-0945	Court Martial Administration	Cdr (retired) Blythe
0945-1030	View from the Bench	Col Brais
1030-1045	*Coffee*	
1045-1200	Conclusion	Col Carter
1200-1300	*Lunch*	
1300-1330	Out Clearance	
1335	Bus Departs	

Annex H

JUDGE ADVOCATE GENERAL GENERAL INSTRUCTION TO DIRECTOR OF MILITARY PROSECUTIONS

Judge Advocate General
General Instruction
001/DMP/00
21 February 2000

1. This general instruction is issued to the Director of Military Prosecutions pursuant to my authority under section 165.18(2) of the *National Defence Act.*
2. In accordance with the requirements of an open, transparent and accountable military justice system and consistent with the practice of other prosecution authorities across Canada, I am instructing you to develop, implement and make publicly available prosecution policies in the following areas:
   - The Canadian Military Prosecution Service: Relationship with the Canadian Forces National Investigation Service;
   - Pre-Charge Screening;
   - Exercise of Prosecutorial Discretion and Post-Charge Screening;
   - Prosecution of Sexual Assault Cases;
   - The Canadian Military Prosecution Service Relationship with Canadian Forces authorities;
   - Disclosure at courts martial;
   - Responding to Victims' Needs;
   - Plea, Trial and Sentence Resolution Discussions;
   - Canadian Military Prosecution Service — Relationship with Unit Legal Advisers;
   - Accountability, Independence and Consultation;
   - Withdrawal of Charges;
   - Witness Interviews;
   - Immunity from prosecution.
3. These policies are to come into effect no later than 31 March 2000.



Jerry S.T. Pitzul
Brigadier-General
Judge Advocate General